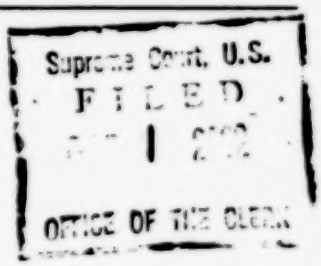
No. 02-6683 Status: ARGUED
Title: Hernan O. Castro, Petitioner
v.
United States
Docketed: October 2, 2002
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (01-12181)
Decision Date: May 7, 2002
Rehearing Denied: July 5, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 1 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 1, 2002)
Oct 9 2002	Waiver of right of respondent United States to respond filed.
Oct 24 2002	Response Requested . (Due November 25, 2002) None received.
Nov 21 2002	Order extending time to file response to petition to and including December 26, 2002.
Dec 26 2002	Brief of respondent United States in opposition filed.
Jan 8 2003	Reply of petitioner Hernan O. Castro filed.
Jan 27 2003	Petition GRANTED. and the motion of petitioner for leave to proceed in forma pauperis is granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Does this Court have jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of a Sec. 2255 petition for a writ of habeas corpus as second or successive?
Feb 12 2003	Motion to appoint counsel filed by petitioner Hernan O. Castro.
Mar 13 2003	Joint appendix filed.
Mar 13 2003	Brief of petitioner Hernan O. Castro filed.
Mar 13 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Apr 10 2003	Order extending time to file respondent's brief on the merits to and including May 28, 2003.
May 21 2003	Further extension of time within which to file respondent's brief on the merits to and including June 11, 2003.
Jun 11 2003	Brief of respondent United States filed.
Jul 1 2003	Application (03A24) to extend the time to file a petition for rehearing from July 11, 2003 to August 10, 2003, submitted to Justice Kennedy.
Jul 7 2003	SET FOR ARGUMENT October 15, 2003.
Jul 9 2003	Application (03A24) the time for filing the reply brief on the merits is extended to and including July 16, 2003.
Jul 11 2003	CIRCULATED.
Jul 16 2003	Reply of petitioner Hernan O. Castro filed. (Distributed)
Aug 6 2003	Motion DISTRIBUTED for Conference of September 29, 2003.
Aug 6 2003	Record received from the U.S.C.A for the 11th Circuit. (1 folder)
Aug 6 2003	Record received from the U.S.D.C. for the Southern District of Georgia. (3 boxes)
Oct 6 2003	Motion to appoint counsel filed by petitioner GRANTED. Michael G. Frick, Esquire, of Brunswick, Georgia is appointed to serve as counsel for the petitioner in this case.
Oct 15 2003	Argued. For Petitioner: Michael G. Frick. For Respondent: Dan Himmelfarb, Assistant to

the Solicitor General.

DOCKET NO. 02-6683 (2)

SUPREME COURT OF THE UNITED STATES



HERNAN O'RYAN CASTRO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW, Petitioner Hernan O'Ryan Castro, by and through counsel appointed under the Criminal Justice Act of 1964, 18 U.S.C. §3006A(d)(6) by the United States District Court for the Southern District of Georgia, Savannah Division, on July 25, 2000, and asks for leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

This 30th day of September, 2002.

Michael G. Frick

MICHAEL G. FRICK
Georgia Bar # 277125
N. DANIEL LOVEIN
Georgia Bar # 459329

Attorneys for Petitioner Hernan O'Ryan Castro

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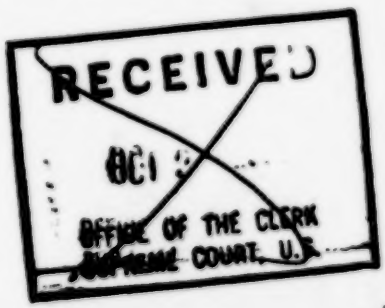

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I. QUESTION PRESENTED FOR REVIEW

When a United States District Court re-characterizes a pro-se federal prisoner's first post conviction motion as a habeas petition under 28 U.S.C. §2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled §2255 petition a "second or successive petition" within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?

II. LIST OF ALL PARTIES TO PROCEEDING IN ELEVENTH CIRCUIT COURT OF APPEALS

A. United States of America
B. Hernan O'Ryan Castro

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B. Castro v. United States 290 F.3d 1270 (11th Cir. 2002)

VII. STATEMENT OF BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed in this petition was entered May 7, 2002. The Court of Appeals entered an Order July 5, 2002, denying Petitioner's Petition for Rehearing. 28 U.S.C. §1254 confers jurisdiction on this Court to review on Writ of Certiorari the opinion of the 11th Circuit in Castro v. United States, 290 F.3d 1270 (11th Cir. 2002).

VIII. **STATUTES INVOLVED IN CASE**

28 U.S.C. §2255

28 U.S.C. §2244

Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, 110 Stat. 1214

IX. **STATEMENT OF THE CASE**

This Petition arises from the opinion of the United States Court of Appeals for the Eleventh Circuit of May 7, 2002, in the case of Castro v. United States, 290 F.3d 1270 (11th Cir. 2002). (Appendix A). In its opinion, the 11th Circuit Court of Appeals affirmed the Order of the United States District Court for the Southern District of Georgia, dated April 11, 2001, (Appendix B-1) wherein the District Court concurred with the Magistrate Judge's Report and Recommendation (Appendix B-2) and dismissed Hernan O'Ryan Castro's (hereinafter referred to as "Castro") Petition for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. §2255. Mr. Castro is currently incarcerated.

In an indictment returned on September 3, 1991, Castro was charged with conspiracy to distribute and possess with intent to distribute cocaine (count one) and conspiracy to import cocaine (count two) in violation of 21 U.S.C. §§ 846 and 963. Castro was convicted and sentenced to 240 months imprisonment on July 14, 1992. Castro then appealed his conviction and sentence. The Eleventh Circuit affirmed both on March 24, 1994. See United States v. Taylor, 17 F.3d 333 (11th Cir. 1994), cert. denied, 513 U.S. 950 (1994).

On July 11, 1994, Castro filed a pro-se Motion for New Trial and Brief in Support Thereof pursuant to Federal Rule of Criminal procedure 33, allegedly based on newly discovered evidence. (Appendix F-1). Castro alleged in his Rule 33 Motion that he had discovered new evidence that the Government had entered into an immunity agreement with a witness who testified against Castro at his trial. Castro also alleged that the Government's failure to disclose the immunity agreement violated the doctrines set forth in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,

504 U.S. 150 (1972). Additionally, Castro asserted that the Government knowingly used perjured testimony to obtain his conviction.

In response to Castro's pro-se Motion for New Trial pursuant to Rule 33, the Government asserted to the District Court that the Government had no objection to Castro's Rule 33 Motion for New Trial being treated as a demand for relief under both Rule 33 and 28 U.S.C. § 2255. (Appendix F-2). After receiving the Government's response to his Rule 33 Motion, Castro filed a pro-se Reply to the Government's Response in which Castro stated that he had properly filed his Motion for New Trial under Federal Rule of Criminal Procedure 33. (Appendix F-3).

In an Order entered October 28, 1994, the United States District Court for the Southern District of Georgia denied Castro's pro-se Motion for New Trial. (Appendix B-3). However, the Order stated: "In the government's response, the government asserts that it has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. §2255. Accordingly, the court will consider defendant's motion as requesting both kinds of relief." Therefore, in denying Castro's pro-se Motion for New Trial, the District Court considered Castro's Motion as requesting relief under both Rule 33 and 28 U.S.C. §2255.

Castro appealed the denial of his self-titled Rule 33 Motion to the Eleventh Circuit Court of Appeals. In its opinion affirming the District Court's denial of Castro's Motion, the Eleventh Circuit Court of Appeals stated that the appeal arose "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255 and motion for new trial, Fed. R. Crim. P. 33." (Appendix B-4).

On April 22, 1997, Castro, acting pro-se, and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (which amended 28 U.S.C. §2255 by barring federal habeas

petitioners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances), filed his first titled 28 U.S.C. §2255 habeas petition. (Appendix F-4). Castro's petition alleged, among other things, that he was rendered ineffective assistance of counsel in violation of the Sixth Amendment in that his trial counsel did not move to suppress Castro's post-arrest statements which were made in violation of his Sixth Amendment rights. The District Court adopted the Report and Recommendation of the Magistrate Judge and denied Castro's §2255 Petition on April 13, 1998. (Appendix B-5).

The Eleventh Circuit Court of Appeals then granted Castro's (still acting pro-se) Motion for Certificate of Appealability on the issue of whether counsel was ineffective by not adequately arguing to suppress Castro's post-arrest statements. In its Order of June 13, 2000, the Eleventh Circuit Court of Appeals found that the District Court had not applied Sixth Amendment analysis in deciding whether or not Castro's trial counsel was ineffective in failing to move to suppress statements Castro made after his arrest. (Appendix B-6). Therefore, the Eleventh Circuit vacated the decision of the District Court and remanded with instructions to the District Court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim, and examine the record to determine if the petition is successive. Also, the Eleventh Circuit Court of Appeals suggested that the District Court hold an evidentiary hearing with regard to the post-arrest statements and suggested the appointment of counsel for Castro would assist the Court. The undersigned attorneys for Castro were then appointed by the Court to represent Castro. (Appendix F-5).

Before the evidentiary hearing was held, the Government filed a Motion to Dismiss Castro's Successive Petition pursuant to 28 U.S.C. §2255 on September 13, 2000. (Appendix F-6). The Government acknowledged in its Motion to Dismiss that on July 14, 1994, Castro had filed a Motion

for New Trial based on newly discovered evidence. However, the Government argued that because the District Court grounded its holding also under §2255, and because the Eleventh Circuit termed Castro's pleading as a combined 28 U.S.C. §2255 petition and Rule 33 Motion for New Trial, Castro's first self-titled §2255 petition was successive, and should be dismissed pursuant to AEDPA.

On September 29, 2000, an evidentiary hearing was held in the United States Magistrate Court. The proceedings of the Magistrate hearing are not part of this appeal, as on January 30, 2001, the Magistrate Court Judge issued a Report and Recommendation granting the Government's Motion to Dismiss Castro's 28 U.S.C. § 2255 Petition as successive. (Appendix B-7). The substance of Castro's petition and the issues raised at the evidentiary hearing were not ruled upon. Thereafter, on April 11, 2001, the District Court adopted the Report and Recommendation of the Magistrate Court and dismissed Castro's petition. (Appendix B-1). On April 25, 2001, the District Court granted a Certificate of Appealability with respect to the issue of whether the 28 U.S.C. §2255 Petition filed by Castro is a successive petition.

After receiving briefs from Castro and from the United States, the United States Court of Appeals for the Eleventh Circuit entered an opinion on January 2, 2002, in favor of Castro. (Appendix B-8). In its opinion of January 2, 2002, the Court held that "a district court's re-characterization of a petitioner's initial post conviction motion will not be considered a first Habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization." The Eleventh Circuit found in its January 2, 2002, opinion that "Castro's original Rule 33 Motion for New Trial asserted a cognizable ground for relief and that it was based upon alleged new evidence which Rule 33 explicitly provides as a basis for bringing such a motion." The court held that it was inconceivable that Castro or any other pro-se litigant could have foreseen

the ultimate consequences of the district court's re-characterization of his Rule 33 motion. (Appendix B-8). The Eleventh Circuit recognized the unfairness inherent in re-characterizing the Rule 33 motion and held that the re-characterization would not count as a first habeas petition. Therefore, the court found that Castro's §2255 petition is not successive and remanded the case to the district court to consider the merits of the petition. (Appendix B-8).

Thereafter, mandate never issued as required by Rule 41 of the Federal Rules of Appellate Procedure and on May 7, 2002, surprisingly, the Eleventh Circuit vacated its opinion of January 2, 2002, and substituted a completely opposite opinion. (Appendix A). Specifically, the Eleventh Circuit held in its opinion dated May 7, 200, that Castro's §2255 petition is successive. In support of its one hundred and eighty degree change in opinion, the court held that to allow Castro to file his current §2255 petition "might undermine the congressional purpose behind the AEDPA, which is to limit successive §2255 petitions. Therefore, the Court disagreed with the First Circuit's opinion in Raineri v. U.S., 233 F.3d 96, 99 (1st Cir. 2000). Instead, the Court suggested that "in the future, district courts should warn petitioners of the consequences of re-characterizing their motions as §2255 petitions." The same panel which entered the January 2, 2002, opinion entered the May 7, 2002, opinion. The Honorable Justice Roney dissented to the May 7, 2002, opinion.

On May 24, 2002, Castro filed a Petition for Rehearing En Banc with the Eleventh Circuit. (Appendix F-7). On July 5, 2002, the Eleventh Circuit issued an Order Denying Castro's Petition for Rehearing. (Appendix C). On July 15, 2002, the Eleventh Circuit entered a Judgment and issued mandate. (Appendix D). Finally, on July 25, 2002, the District Court ordered that the Judgment of the Eleventh Circuit be made the Judgment of the District Court and Castro's first self-titled habeas petition was dismissed and never heard. (Appendix B-9).

ARGUMENT AND CITATION OF AUTHORITY

This petition for Writ of Certiorari should be granted due to the fact that the United States Court of Appeals for the Eleventh Circuit has entered an opinion in direct conflict with opinions of the other circuits on the same important issue. Specifically, the issue presented for review is: "When a United States District Court re-characterizes a pro-se federal prisoner's first post conviction motion as a habeas petition under 28 U.S.C. § 2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled § 2255 petition a 'second or successive petition' within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?" The answer to this question determines whether or not prisoners are afforded the opportunity to present claims of constitutional violations to the courts.

With regard to post conviction motions filed by pro-se prisoners, the federal courts have historically gone out of their way to benefit the rights of the prisoners by re-characterizing inartfully drafted post conviction motions of prisoners who mistakenly relied on inappropriate rules or statutes. Raineri v. United States, 233 F.3d 96, 97 (1st Cir. 2000), citing Haines v. Kerner, 404 U.S. 519, 520-21, 30 L.Ed. 2d 652, 92 S. Ct. 594 (1972); Prou v. United States, 199 F.3d 37, 42 (1st Cir. 1999).

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this practice was harmless and benefitted pro-se prisoners. Courts could easily re-characterize improperly filed post conviction motions as 28 U.S.C. §2255 habeas petitions and then rule on the substance of the prisoners claims. However, as explained by Raineri, Id. at 99, "AEDPA, which took effect on April 24, 1996, imposes substantial procedural restrictions on second or successive habeas petitions. Of particular relevance here, AEDPA incorporates by reference in section 2255 the same screen that makes it applicable to second or successive habeas petitions

prosecuted on behalf of state prisoners: it requires a federal prisoner, before prosecuting a second or successive habeas petition in the district court, to obtain from 'the appropriate court of appeals...an order authorizing the district court to consider the application. 28 U.S.C. §2244(b)(3)(A) (as incorporated in 28 U.S.C. §2255). In turn, AEDPA directs the court of appeals to exercise this gatekeeping power sparingly, in conformity with a rigorous set of substantive standards."

In other words, where before AEDPA, a court would be benefitting a pro-se prisoner by re-characterizing a post conviction motion as one requesting relief under 28 U.S.C. §2255, after AEDPA, the same practice would have the effect of preventing a prisoner from ever filing a first titled § 2255 habeas petition because AEDPA makes it almost impossible for a prisoner to meet the requirements necessary in order to file a second or successive petition. Specifically, in order to file a second or successive petition, a prisoner must first present the second petition to the appropriate circuit court of appeals which must determine that the prisoner has made a prima facie showing: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Castro's argument is that it is unfair for a court to *sua sponte* re-characterize a post conviction motion as a habeas motion and then use AEDPA to prevent him from filing his first titled §2255 petition, especially when AEDPA was enacted after Castro filed his Rule 33 Motion and before he filed his first titled §2255 petition. Although the Eleventh Circuit did not agree with this argument, almost every other circuit does agree with Castro, which is why this petition for certiorari should be granted.

The only other U.S. Court of Appeals which agrees with the Eleventh Circuit on this issue is the Fifth Circuit. In In Re: Tolliver v. United States, 97 F.3d 89 (5th Cir. 1996), the Court held that a pro-se petitioner's re-characterized pleading should be deemed a habeas petition for AEDPA purposes. In Tolliver, the petitioner filed a motion to dismiss his conviction on May 20, 1996, (after AEDPA) and over his objections the district court construed his motion as a § 2255 motion and prevented him from filing a first titled § 2255 petition under the purview of AEDPA. Id., at 90.

However, every other Court of Appeals in every other circuit has decided the issue differently and has noted the unfairness inherent in the approaches taken by the 5th and 11th Circuits. The Second Circuit addressed the issue next. In Adams v. U.S.A., 155 F.3d 582 (2nd Cir. 1998), the court held that "District Courts should not recharacterize a motion purportedly made under some other rule as a motion made under §2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the courts find that, notwithstanding its designation, the motion should be considered as made under §2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized." Id., at 584.

The 3rd Circuit agreed with the 2nd Circuit in USA v. Miller, 197 F.3d 644 (3rd Cir. 1999). The Court in Miller held that if a district court chooses to recharacterize a pro se prisoner's post conviction motion as a habeas petition, it first must take prophylactic measures to warn the prisoner of the consequences of the conversion under AEDPA and give him the opportunity to withdraw the pleading. Id., at 652. The court specifically noted the "unfairness" to pro se petitioners if prophylactic measures are not taken by district courts. Id., at 649. The 3rd Circuit did not agree with

the Tolliver, id. decision and questioned why the Tolliver Court did not address or explain the fairness concerns "discussed at length in Adams". Miller, at 651.

The 1st Circuit was the next to address the issue in Raineri v. United States, 233 F.3d 96 (1st Cir. 2000). The facts in Raineri are almost identical to those in Castro's case. In Raineri, the pro-se petitioner filed what he termed a "Motion for Correction of Sentence and/or New Trial" on January 22, 1996, before AEDPA was enacted (like Castro). Id., at 98. The Court, acting *sua sponte*, and after AEDPA was enacted, found Rules 33 and 35 inapplicable, but re-characterized the motion as an application for relief under 28 U.S.C. §2255 (like Castro). Id., at 98. The Raineri Court recognized the unfairness concerns raised in Miller, id., and Adams, id. Although the Raineri Court did not propose the same prophylactic measures as Adams and Miller, the Raineri Court held "when a district court, acting sua sponte, converts a post conviction motion filed under some other statute or rule into a Section 2255 petition without notice and an opportunity to be heard (or in the alternative, the pleader's informed consent), the recharacterized motion ordinarily will not count as a "first" habeas petition sufficient to trigger AEDPA's gatekeeping requirements." Id., at 100.

In United States v. Seesing, 234 F.3d 456 (9th Cir. 2000), the Ninth Circuit adopted the decisions of the 2nd and 3rd Circuits in Adams and Miller respectively. As the Seesing Court stated, "The rule of liberal construction and its application to 28 U.S.C. § 2255 motions is for the benefit of the pro se prisoner, its rationale loses validity where it is invoked to the prisoner's disadvantage." Seesing, at 463. The Seesing Court, like the 1st, 2nd and 3rd Circuits, recognized the unfairness of recharacterizing a pro se prisoner's motion and then preventing the prisoner from filing a first titled §2255 petition. The Castro Court is the only court to address the fairness concerns, yet reach a different result.

The Tenth Circuit addressed the issue next in United States v. Kelly, 235 F.3d 1238 (10th Cir. 2000). The Court in Kelly also agreed with and adopted the approach taken by the Second and Third Circuits. Kelly, at 1242. In Kelly, Id., the prisoner filed a motion seeking relief under Fed. R. Crim. P. 32(c)(3)(D) and 35(a) and (6). Id., at 1240. The district court treated the motion administratively as a motion under 28 U.S.C. §2255. Id., at 1240. The court held that although the prisoner's motion was most appropriately viewed as a §2255 motion, because the district court did not take any steps to determine whether the prisoner agreed to its treatment of the motion, it would vacate the court's order denying the motion and remand the case so that the prisoner could make all of his collateral arguments in a single §2255 motion. Id., at 1242. The court recognized the concern of recharacterizing these motions due to the provisions of AEDPA generally prohibiting successive petitioners. Id., at 1242. Again, it seems that the 11th Circuit in Castro's case shared the same concerns in its first opinion, but authored its second opinion in direct conflict with every other circuit other than the 5th.

In Henderson v. United States, 264 F.3d 709 (7th Cir. 2001), the Seventh Circuit also agreed with the majority of the circuits. In Henderson, the petitioner prisoner filed a Fed. R. Crim. P. 33 motion and the district court deemed the motion as a §2255 petition. He then moved for leave to file his second motion under 28 U.S.C. §2255 attacking his conviction and sentence. Id., at 710. The court held that it would not "deem a Rule 33 (or other mislabeled motion) a section 2255 motion unless the movant had been warned about the consequences of his mistake." Id., at 711. Again, the 11th Circuit's decision in Castro is in direct conflict with the Seventh Circuit's decision on this issue.

Next, on May 7, 2002, the Eleventh Circuit Court of Appeals completely reversed itself when it issued its second opinion in Castro's case. Castro v. United States, 290 F.3d 1270 (11th Cir. 2002).

Reversing course, the Eleventh Circuit this time took issue with the Raineri, Id., opinion stating that to "relieve an entire class of motioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized . . . might undermine the congressional purpose behind the AEDPA, which is to limit successive §2255 motions." Id., at 1274. The Court then dismissed Castro's motion as successive and noted "in future cases where the motioner is not filing a second motion, but rather is asking to withdraw his motion or to include additional claims after a district court has decided to recharacterize the initial motion as a §2255 motion, we would agree with a clear majority of the circuits that the district courts should warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings." Id. There is no rational reason for such a distinction. How was Castro supposed to know of the consequences of the court's *sua sponte* re-characterization of his Rule 33 Motion to Dismiss which was filed before AEDPA had ever been passed?

On the same day, May 7, 2002, the Fourth Circuit decided the issue differently in United States v. Emanuel, 288 F.3d 644 (4th Cir. 2002). In Emanuel, petitioner filed a Motion to Vacate his sentence and labeled it as a Rule 35 Motion. Id., at 646. The petitioner had never filed a §2255 motion for relief from his sentence. Id., at 646. The district court, *sua sponte* and without notice to the petitioner construed the motion as a §2255 motion and summarily dismissed the motion under Rule 4 of the rules governing §2255 proceedings. Id., at 646. The petitioner filed a motion arguing that the Court erred by construing his original motion, styled as a Rule 35 motion, as a §2255 motion. Id., at 646. The petitioner also attached a proposed §2255 motion listing several additional claims he wished to pursue in a collateral proceeding. Id., at 646. The petitioner requested that his original Motion to Reconsider be withdrawn and that the court consider the attached §2255 motion

and that the court reconsider its Order denying relief. Id., at 646. The district court found that it had properly construed the petitioner's Rule 35 motion as a §2255 motion and denied all requested relief. Id., at 646.

The Fourth Circuit Court of Appeals then, after considering the decisions on this issue from all of the other Circuits, including the Eleventh Circuit's first decision in Castro v. United States, 277 F. 3d 1300 (11th Cir. 2002), vacated the district court's orders denying the petitioner relief and remanded the case for further proceedings. Specifically, the Court in Emanuel, held ". . . if a prisoner files a motion that is not denominated as a section 2255 motion and the court at its option prefers to convert it into the movant's first section 2255 motion, the court shall first advise the movant that it intends to so recharacterize the motion. The court shall also notify the movant of the section 2255 restrictions on second or successive motions, the one year period of limitations, and the four dates in section 2255 to be used in determining the starting date for the limitations period. The notice to the movant shall set a reasonable amount of time for the prisoner to respond to the court's proposed recharacterization and shall advise the prisoner that failure to respond within the time set by the court will result in the original motion being recharacterized as a section 2255 motion." Emanuel, at 649. The Court then went on to state that because the petitioner was not given notice of the adverse consequences of having his Rule 35 motion construed as an initial §2255 motion, the district court's order denying the petitioner relief would be vacated and the case would be remanded for further proceedings. Emanuel, at 650. In support of its opinion, the Emanuel Court cited the Eleventh Circuit's first opinion in the Castro case. Emanuel, at 649. Therefore, on the same day the Eleventh Circuit reversed itself, the Fourth Circuit issued an opinion on the same issue

and followed the Eleventh Circuit's initial opinion before it was vacated. The need for this Honorable Court's intervention is apparent.

On July 10, 2002, the Sixth Circuit decided the issue for the first time in In Re: Shelton, 295 F. 3d 620 (6th Cir. 2002). In Shelton, the petitioner, after being sentenced, filed with the district court a motion captioned "Motion to Dismiss for Lack of Territorial Jurisdiction." Shelton, at 621. The district court, without giving prior notice to Shelton, construed the motion as one filed pursuant to 28 U.S.C. §2255 and dismissed it. Shelton, at 621. Later, the petitioner filed a second motion in the district court arguing that his counsel had rendered ineffective assistance and the petitioner filed the later motion under §2255. Shelton, at 621. At that time, the petitioner argued that he had intended his prior motion to be construed as filed pursuant to Rule 12(b)(2) or Rule 33 and not § 2255. Shelton, at 621. The district court rejected the petitioner's argument and held that the second motion was a second or successive motion brought under 28 U.S.C. §2255. Shelton, at 621. The Sixth Circuit, in Shelton, decided to follow the Adams decision from the Second Circuit. Specifically, the Shelton Court agreed with Adams and held that "district courts should not recharacterize a motion purportedly made under some other rule as a motion made under section 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under section 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than to have it so recharacterized." Shelton, at 622, citing Adams, 155 F.3d at 584. The court went on to hold that because the district court, before recharacterizing the petitioner's first post-conviction filing as a §2255 motion, did not provide the petitioner with appropriate notice and an opportunity to withdraw, that motion could not

be counted against him for purposes of the bar on a successive § 2255 motion. Shelton, at 622. Again, the Sixth Circuit decided the issue in line with the majority of the circuits and in a manner that directly conflicts with the opinion of the Eleventh Circuit in Castro.

On July 19, 2002, the United States Court of Appeals for the District of Columbia Circuit rendered an opinion which perhaps best explains why the Castro decision was wrong and why this Petition for Writ of Certiorari should be granted. In United States v. Palmer, 296 F.3d 1135 (D.C. Cir. 2002), a pro se petitioner, in 1995 prior to the enactment of AEDPA, filed his first pro-se post conviction motion. Palmer, at 1137. The motion sought a new trial pursuant to Rule 33, just like Castro's motion. Palmer, at 1137. On December 5, 1995, the district court denied the Rule 33 motion. Palmer, at 1138. The D.C. Circuit then noted that "although Palmer's motion for a new trial based on newly discovered evidence is untimely under Federal Rule of Criminal Procedure 33, his request for a new trial can be treated as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255." Id. Thereafter, the motion was decided on its merits and denied. Id.

The petitioner then filed a §2255 motion and the government argued that because the court had deemed the petitioner's Rule 33 motion as a motion for new trial and as a motion under 28 U.S.C. §2255, the first titled 2255 motion was subject to the procedural limitations of the newly enacted AEDPA. Id. The district court then dismissed the 2255 motion concluding that under the AEDPA the motion was successive and must initially be addressed by the Court of Appeals. Id., at 1141.

In determining whether or not petitioner's first titled 2255 motion was successive under the AEDPA, the court recognized that the AEDPA significantly changed the consequences of district courts converting post conviction motions of prisoners who unsuccessfully sought relief under some

other provision of law into motions made under 28 U.S.C. § 2255. Palmer, at 1143. The Palmer court discussed the decisions on this issue from all of the other circuits which had already decided this issue. The Palmer court also criticized the second Castro decision. Specifically, the Palmer court stated "moreover, Castro II's homage to congressional intent seems, to us, ill founded. Nothing in the AEDPA indicates that a post conviction motion not styled as a § 2255 motion must be deemed one simply because it could be so styled. Indeed, the AEDPA does not define a second or successive motion at all." Palmer, at 1146. The Court then went on to hold "in sum, having denominated his filing as a motion for new trial based on newly discovered evidence under Rule 33, Palmer was entitled to have his motion decided under that rule. We could have affirmed its denial as either untimely or meritless. Because Palmer was not given notice of the potential adverse consequences flowing from this Court's construction of his motion as a §2255 motion, we reverse the district court's order requiring Palmer to request a Certificate of Appealability pursuant to the AEDPA and remand for further proceedings consistent with this opinion." Palmer, at 1148. Again, the D.C. Circuit decided the issue differently and even criticized the Eleventh Circuit's decision in Castro.

Finally, the Eighth Circuit decided the issue on September 6, 2002. In Morales v. United States, 2002 U.S. Appeals Lexis 18333 (8th Cir. 2002), petitioner, after being sentenced, filed in the district court a pro-se "Petition for Right of Review Pursuant to Title 5, United States Code Section 702." Acting *sua sponte*, the district court reclassified his petition as a § 2255 motion. The Eighth Circuit held that "before a district court may reclassify a pro se litigants pleading as a section 2255 motion, it must warn him of the consequences of the reclassification and allow him an opportunity to withdraw his pleading." The Court held that the district court erred by failing to provide the petitioner a warning and an opportunity to withdraw his petition. The Court went on to state "we

agree with the majority approach, and we hold as follows. When a district court intends to reclassify a pro se litigant's pleading as a section 2255 motion, it must do two things. First, the court must warn the litigant of the restrictions on second or successive motions, and of the one year limitations period, set forth in 28 U.S.C. section 2255. Second, the court must provide him an opportunity either to consent to the reclassification or to withdraw his motion. Because the district court did not provide Morales with this information and an opportunity to choose which course of action to take, this case must be remanded so that Morales may decide whether to consent to reclassification or to withdraw his motion."

The Eleventh Circuit and the Fifth Circuit are the only circuits which hold that the AEDPA prohibits the filing of a first titled §2255 petition after a district court, without warning, recharacterizes a pro-se prisoner's first post conviction motion as a §2255 petition. Every other circuit has addressed the issue and has adopted either the Adams warnings or some variation of it. However, the Eleventh Circuit's decision in Castro is in direct conflict with the decisions and opinions rendered by every circuit other than the Fifth Circuit. The issue regarding the AEDPA and its effect on pro-se prisoner's first titled habeas petitions is not only important to Castro, but is of the utmost importance to all pro-se prisoner's in the Eleventh Circuit who are unfortunate enough to have had the court *sua sponte* recharacterize a post-conviction motion as a §2255 petition. This practice prevents prisoners from filing habeas petitions and prevents the hearing of potentially valid constitutional claims. This is especially true in Castro's case as a review of the record clearly shows that his first post-conviction motion, the Rule 33 Motion for New Trial, was a properly labeled motion. For the district court to be able to place any label it wishes on a post-conviction motion and then use the AEDPA to prevent the filing of a habeas petition seems unconscionable. Guidance is

desperately needed by this Court as to how court's of the varying circuits are to address this issue. The purpose of the AEDPA was not to prevent the filing of habeas petitions. However, such is the effect it has had in the Eleventh Circuit.

Throughout the opinions cited in this petition, much discussion revolves around whether or not the best approach to take is the prophylactic approach described by Adams and Miller or the remedial approach described by Raineri. However, all of the circuits save the Eleventh and the Fifth agree that if a district court recharacterizes a pro se petitioner's post conviction motion as a §2255 petition without informing the petitioner of the consequences of such action, such first post conviction motion will not count as a first petition under the purview of the AEDPA. Therefore, guidance by this Court is needed so that it will not depend on which circuit a petitioner files his habeas motion as to whether or not it will be heard. There is no justifiable reason why Castro's habeas petition would be heard in any circuit other than the Fifth or Eleventh.

CONCLUSION

Petitioner Hernan O'Ryan Castro respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari. The issue presented is of utmost importance as it seems that whether or not prisoners' potentially valid constitutional claims are heard depends on which circuit court has jurisdiction over the claim. There is no uniformity with regard to habeas petitions and how they are effected by the AEDPA. The Eleventh Circuit's opinion in Castro's case is inconsistent with the opinions of other circuit courts on this very important issue and therefore Castro requests that this Court grant his petition.

[signatures continued on next page]

This 30th day of September, 2002.

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Response Requested

ORIGINAL

No. 02-6683 (3)

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IN THE SUPREME COURT OF THE UNITED STATES

HERNAN O'RYAN CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's motion to vacate his sentence under 28 U.S.C. 2255 because it was a second or successive Section 2255 motion.

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-6683

HERNAN O'RYAN CASTRO, PETITIONER

v.

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A at 1-13) is reported at 290 F.3d 1270.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2002. A petition for rehearing was denied on July 5, 2002. The petition for a writ of certiorari was filed on October 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to possess with the intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846, and

conspiracy to import cocaine, in violation of 21 U.S.C. 963. Pet. App. F1, Exhibit A (Judgment) at 1. He was sentenced to 240 months' imprisonment. Id. at 2. The court of appeals affirmed, United States v. Taylor, 17 F.3d 333 (11th Cir. 1994), and this Court denied certiorari. Castro v. United States, No. 94-5623, 513 U.S. 950 (1994).

2. On July 11, 1994, petitioner filed a pro se motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Pet. App. A at3; Pet. App. F1. He argued, among other things, that an immunity agreement entered into by a witness who testified at his trial constituted newly discovered evidence that the government had failed to disclose in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Pet. App. F1 at 7-18. The government's response to the new trial motion stated that petitioner's claim of a "Brady/Giglio violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255," but that because "such a motion may be filed at any time, the government has no objection to [petitioner's] motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." Pet. App. A at 3; Pet. App. F2 at 7. Petitioner filed a reply to the government's response, in which he argued that his motion was properly filed under Rule 33. Pet. App. A at 3; Pet. App. F3 at 2.

The district court denied the new trial motion. Pet. App. B3 at 1-8. The court noted that the government had asserted that it had no objection to the motion "being treated as demanding relief

under both Rule 33 and 28 U.S.C. § 2255," and stated that it would therefore "consider [petitioner's] motion as requesting both kinds of relief." Id. at 3. With respect to petitioner's claim that the government improperly failed to disclose a witness's immunity agreement, the court concluded that because "[a]ny impeaching effect from the immunity agreement would have been minimal," there was no reasonable probability that disclosure of the agreement would have affected the outcome of petitioner's trial. Id. at B5.

The court of appeals affirmed in an unpublished per curiam order. Pet. App. B4 at 1-2. The court stated that petitioner's appeal was "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," and it affirmed "for the reasons set forth" by the district court. Pet. App. B4 at 2.

3. On April 22, 1997, petitioner filed a motion for collateral relief under 28 U.S.C. 2255, claiming, among other things, that his trial counsel rendered constitutionally ineffective assistance by failing to file a motion to suppress statements that petitioner made after his arrest on the ground that the statements were taken in violation of his Sixth Amendment right to counsel. Pet. App. B6 at 2; Pet. App. F4 at 4. The district court denied the Section 2255 motion. Pet. App. B5 at 1-3.

The court of appeals, after granting petitioner a certificate of appealability under 28 U.S.C. 2253 on the ineffective assistance claim, Pet. App. A at 3-4, vacated the district court's order

denying the Section 2255 motion and remanded for further proceedings. Pet. App. B6 at 1-5. On remand, the court stated, the district court should "employ Sixth Amendment analysis" in evaluating petitioner's ineffective assistance claim and "develop more fully the facts surrounding" that claim. Id. at 5. The court of appeals also noted that "there is some question of whether this petition is successive," and it directed the district court to "examine the record to determine" whether petitioner's Section 2255 motion was successive. Ibid.

4. After the remand, the government moved to dismiss petitioner's Section 2255 motion pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which became effective on April 24, 1996. Pet. App. F6. AEDPA requires any prisoner seeking to file a "second or successive motion" under Section 2255 to first receive certification from the court of appeals that the motion relies on either (1) newly discovered evidence that establishes that no reasonable factfinder would have found the movant guilty of the offense or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. 2255 ¶ 8. The government argued that because petitioner's 1994 new trial motion was treated as a request for collateral relief pursuant to 28 U.S.C. 2255, his current motion was a second or successive motion that had not been authorized by the court of appeals. Pet. App. F6 at 1-5.

A magistrate judge recommended that petitioner's Section 2255

motion be dismissed on the ground that it was a successive motion filed without authorization from the court of appeals. Pet. App. B2. Adopting the magistrate judge's report and recommendation, the district court dismissed the Section 2255 motion as a successive motion. Pet. App. B1. The district court rejected petitioner's claim that the court's recharacterization of his pre-AEDPA new trial motion as a motion under Section 2255, without giving him notice of the potential consequences and an opportunity to amend or withdraw his motion, unfairly barred him from filing a second Section 2255 motion. Id. at 1-3. The court noted that the government's response to the new trial motion put petitioner on notice of the recharacterization, and that petitioner "never objected to the characterization of his motion as one under § 2255." Id. at 2; see Pet. App. B2 at 3-4 ("Petitioner did not object to the Government's suggestion that his motion be construed as one under Rule 33 and 28 U.S.C. § 2255."). The court also noted that pre-AEDPA law would have prohibited petitioner from filing a successive Section 2255 motion raising claims of which he was aware when he filed the first motion, and that petitioner therefore "may have known of the consequences of having his motion for a new trial construed as a § 2255 motion." Pet. App. B1 at 2-3. The district court granted petitioner a certificate of appealability on the issue of whether petitioner's Section 2255 motion was successive.

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[1] The magistrate judge also conducted an evidentiary hearing on petitioner's ineffective assistance claim, but the recommendation did not address the merits of that claim. Gov't C.A. Br. 2 n.1.

Gov't C.A. Br. 3.

5. The court of appeals initially vacated the district court's dismissal of petitioner's Section 2255 motion, ruling that the motion could not properly be treated as successive. Pet. App. B8. Subsequently, the court of appeals, acting sua sponte, withdrew its original opinion and substituted a revised opinion affirming the district court's judgment. Pet. App. A at 1-11. The court observed that "Congress, in enacting the AEDPA, imposed further restrictions on a prisoner's ability to file a second § 2255 petition," and it concluded that "to relieve an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized * * * might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions." Id. at 8-9. The court stated, however, that it shared the "substantial fairness concerns" of other courts of appeals, and it "urge[d]" district courts in future cases to "warn petitioners of the consequences of the recharacterization of their filings as § 2255 petitions." Id. at 11; see id. at 2 ("[I]n the future, when a district court unilaterally recharacterizes a prisoner's pleading as a § 2255 petition, the judge should also warn the prisoner * * * that this recharacterized petition may be his first and only chance to seek relief under § 2255.").

Judge Roney dissented, arguing that other courts of appeals had correctly held that a postconviction motion that is recharacterized by the district court as a motion under Section

2255 "ordinarily will not count as a first petition" for purposes of applying AEDPA's limitations on second or successive Section 2255 motions. Pet. App. A at 12-13.

ARGUMENT

Petitioner contends (Pet. 16-27) that this Court should grant review to resolve a conflict among the courts of appeals concerning whether a Rule 33 new trial motion or other postconviction motion that is recharacterized as a motion filed under 28 U.S.C. 2255 counts as an initial Section 2255 motion for purposes of determining whether a subsequent motion is "second or successive." Although petitioner is correct that the courts of appeals are in conflict over that issue, there is no need for this Court to resolve the disagreement.

1. Before enactment of AEDPA, district courts were permitted to construe a prisoner's post-conviction pleadings liberally to determine whether relief was warranted under 28 U.S.C. 2255. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972). At that time, there were very significant limitations on a prisoner's ability to bring a second or successive motion for postconviction relief. See, e.g., McCleskey v. Zant, 499 U.S. 467 (1991) (petition under 28 U.S.C. 2254). The recharacterization of a pleading as a Section 2255 motion thus had the potential to affect a prisoner's ability to bring an additional Section 2255 motion later. AEDPA, however, placed additional limits on a prisoner's ability to bring a second and successive motion. See, e.g., 28 U.S.C. 2255 ¶ 8 (certification by court of appeals necessary before second or

successive motion can be brought). Accordingly, recharacterizing a post-conviction motion as one filed under Section 2255 is now even more likely to have the effect of barring a subsequently filed Section 2255 motion as "second or successive."

In light of AEDPA's additional restrictions on second or successive Section 2255 motions, a majority of the courts of appeals have held that a district court may not recharacterize a post-conviction motion as one made under Section 2255, unless the prisoner is given the opportunity to withdraw the motion or to consent to the recharacterization. See Morales v. United States, 304 F.3d 764, 767 (8th Cir. 2002); United States v. Palmer, 296 F.3d 1135, 1146 (D.C. Cir. 2002); In re Shelton, 295 F.3d 620, 622 (6th Cir. 2002); United States v. Emmanuel, 288 F.3d 644, 649 (4th Cir. 2002); United States v. Kelly, 235 F.3d 1238, 1242 (10th Cir. 2000); United States v. Seesing, 234 F.3d 456, 464 (9th Cir. 2000); United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999); Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998). Several courts of appeals have similarly held that if a district court recharacterizes a post-conviction motion as one filed under Section 2255 without following that procedure, the motion does not count as a "first" motion under AEDPA's gatekeeping rules. See United States v. Palmer, 296 F.3d at 1148; In re Shelton, 295 F.3d at 622; Henderson v. United States, 264 F.3d 709, 710-711 (7th Cir. 2001); Raineri v. United States, 233 F.3d 96, 100-101 (1st Cir. 2000). In contrast, the Fifth Circuit, in a decision issued shortly after the enactment of AEDPA, held that a prisoner's motion under Section

2255 had to satisfy AEDPA's gatekeeping requirements for second or successive motions because the district court had previously recharacterized his first post-conviction motion as filed under Section 2255 and "there is nothing else" it could have been. In re Tolliver, 97 F.3d 89, 90 (5th Cir. 1996).

There is, however, no need for this Court to resolve the differences in approach among the courts of appeals. The Eleventh Circuit in this case stated that it "agree[d]" with the other courts of appeals "that a district court should not 'extinguish the petitioner's one clear chance at habeas relief under the AEDPA' without the petitioner's informed consent." Pet. App. A at 9 (quoting Raineri, 233 F.3d at 100). Accordingly, it directed district courts in future cases in which the court has decided to recharacterize an initial postconviction motion as a Section 2255 motion to "warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings." Pet. App. A at 9. See also id. at 2, 11. Because the Eleventh Circuit thus effectively adopted, on a prospective basis, the approach mandated by other circuits, the question on which the courts of appeals have disagreed is unlikely to arise in future cases.[2]

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[2] Although the Fifth Circuit has also held that a postconviction motion that is recharacterized as a Section 2255 motion may be counted as a first motion for purposes of applying AEDPA's gatekeeping requirements, see In re Tolliver, 97 F.3d at 90, that decision was issued shortly after the enactment of AEDPA. We are not aware of any Fifth Circuit decisions employing that rule since Tolliver. If the situation arises again in the Fifth Circuit, that court may well reconsider its ruling in Tolliver in light of the concerns articulated by the Eleventh Circuit in this

2. Further review is also unwarranted in this case because petitioner cannot prevail on his motion under Section 2255 in any event. His primary claim was that his attorney rendered ineffective assistance by failing to move to suppress certain post-arrest statements made by petitioner. He asserted that "after officers read him his Miranda rights, he stated he wished to exercise those rights and such a statement was sufficient to assert his Sixth Amendment right to counsel," since he had been indicted before he was arrested. Pet. App. B7, at 2. In response to the court of appeals' remand, an evidentiary hearing was held before a magistrate judge. The magistrate judge ultimately did not rule on the merits of petitioner's claim, because he determined that, as a preliminary matter, it was barred as a second Section 2255 motion that had not been certified by the court of appeals. See Pet. App. B2. The evidence at the hearing demonstrates, however, that petitioner never invoked his right to counsel after receiving the Miranda warning, but instead waived it by speaking with the officers, and that his claim accordingly must fail. See Patterson v. Illinois, 487 U.S. 285 (1988) (failure to invoke right to counsel after being administered Miranda warning sufficient to waive Sixth Amendment right to counsel, where the defendant had not previously indicated that he wanted the assistance of counsel).

Petitioner submitted a declaration in which he asserted that "I was read the Miranda warning. I expressed my wish to exercise my rights." Evid. Hearing Gov't Exh. 1, at ¶ 5. The police

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case and the other courts of appeals.

officer who arrested him, however, stated that petitioner "indicated that he was willing to talk to the agents without an attorney present." 9/29/01 Tr. 9. See also ibid. ("He agreed to talk with us. He was very cooperative.").

When he testified, petitioner confirmed that he had not invoked his right to counsel. (There is no dispute that petitioner had not been appointed counsel at the time that the statements were made.) Petitioner acknowledged that in his own declaration he admitted that his counsel had asked him whether he "had requested an attorney being present during my custodial interrogation" and that petitioner "informed him [counsel] that I had not." 9/21/01 Tr. 17-18; see also id. at 18 ("What my attorney asked me is whether I had asked for an attorney. And I had not, no, not specifically."). After the hearing, the government argued that, although a "factual finding about what [petitioner] said (or did not say) following the reading of his rights" was necessary, the testimony established that petitioner could not show that he invoked his right to counsel. Gov't Response to Castro's Pro Se Supplemental Br. 2. Rather, petitioner's decision to speak to the officers after being made aware of his rights through Miranda warnings constituted a waiver of his right to counsel. Cf. North Carolina v. Butler, 441 U.S. 369, 373, 376 (1979) ("defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" can be sufficient to support a finding of a waiver of Miranda rights; "explicit statement of waiver is not invariably necessary").

Petitioner argued below that courts must presume that a defendant did not waive his rights absent an express statement that he is willing to talk to the officers. Pet. Br. to U.S. Mag. Court at 7 (Oct. 17, 2000). But petitioner's actual engagement in discussion with the officers, after being made aware of his rights, provides sufficient evidence of a waiver. See United States v. Posadas-Rios, 158 F.3d 832, 866-867 (5th Cir. 1998) ("[a]s long as the police administer Miranda warnings before proceeding, a defendant's voluntary decision to answer questions without claiming his right to have a lawyer present to advise him constitutes a `knowing and intelligent' and therefore valid, waiver of his Sixth Amendment right "), cert. denied, 526 U.S. 1031, 1080, 1137 (1999); United States v. Chong, 829 F.2d 1572, 1574 (11th Cir. 1987) ("if after being advised of his rights an individual responds willingly to questions without requesting an attorney, waiver may be implied"). Petitioner therefore cannot support his claim that his statements should have been suppressed under the Sixth Amendment or that counsel was ineffective in failing to move to suppress them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002

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SUPREME COURT OF THE UNITED STATES

HERNAN O'RYAN CASTRO

Petitioner,

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Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

COMES NOW, Petitioner in the above-referenced case and files this his Reply Brief to the Brief of the United States in Opposition to Petitioner's Petition for Writ of Certiorari and shows this Honorable Court the following:

In the second argument made by the Government in its Brief in Opposition, the Government states that "further review is also unwarranted in this case because Petitioner cannot prevail on his motion under § 2255 in any event." The Government then goes on to argue that the Petitioner's underlying § 2255 claim must fail based on the evidence presented at the evidentiary hearing held before the Magistrate Judge. As the Government points out, the Magistrate Judge ultimately did not rule on the merits of Petitioner's § 2255 claim, because the Magistrate Judge determined, as a

preliminary matter, that the § 2255 claim was barred as a second § 2255 motion that had not been certified by the Court of Appeals.

Therefore, the Government argues, that even if the underlying § 2255 petition had been heard by the Magistrate Court Judge, the evidence presented at the hearing before the Magistrate Court Judge does not support Petitioner's claim that his attorney rendered ineffective assistance of counsel by failing to move to suppress certain post-arrest statements made by Petitioner. The Government misses the point. The purpose of the Petition for Writ of Certiorari before this Honorable Court is to determine whether or not Petitioner has a right to bring his alleged second § 2255 motion without having it certified by the Court of Appeals. If this Honorable Court decides that Petitioner has the right to have his claim heard, (as Petitioner has argued in his Petition for Writ of Certiorari), the Magistrate Court Judge will then have the opportunity to rule on the Petitioner's § 2255 Petition based on the evidence which the Magistrate Court Judge heard. In other words, the Government is now asking this Honorable Court to substitute itself as the fact finder at the hearing which was held in front of the Magistrate Court Judge and to deny the Petitioner's § 2255 petition on its merits. The proper court to decide the issue on the merits is the Magistrate Court, which swore the witnesses and heard the testimony. The issue presented to this Honorable Court is not whether Petitioner's § 2255 petition should be granted. The issue is whether or not the Petitioner's first titled § 2255 petition should be heard.

Respectfully submitted this 6th day of January, 2003.

Michael G. Frick
N. Daniel Lovein

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Georgia Bar # 277125
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Attorneys for Petitioner Hernan O'Ryan Castro

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that as required by Supreme Court Rule 29 I have this day served a copy of the within and foregoing **REPLY BRIEF OF Petitioner** upon all parties to this matter, and every other person required to be served, by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennyslvania Ave., N.W.
Washington, D.C. 20530-0001

This 6th day of January, 2003.

Michael G. Frick
N. Daniel Lovein

MICHAEL G. FRICK
Georgia Bar # 277125
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me Court, U.S.
F I L E D
MAR 13 2003
CLERK

No. 02-6683

In The
Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 1, 2002
Certiorari Granted January 27, 2003

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EXHIBIT A

United States District Court

Southern District of Georgia

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	**(For Offenses Committed On or After November 1, 1987)**
Hernan O'Ryan Castro	Case Number: CR491-142-03
(Name of Defendant)	Mark Jenkins and Pomeroy Williams Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) 1 and 2 _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21: 846	Conspiracy to Possess With Intent to Distribute and Distribute Cocaine	07-30-91	1
21:960 and 963	Conspiracy to Import into the U.S. from Outside Territorial Limits thereof, Multi-kilo Quantities of Cocaine Hydrochloride	07-30-91	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 548-43-8812

Defendant's Date of Birth: 04-10-55

Defendant's Mailing Address:

5 Santa Ana Avenue
Daly City, California 94015

Defendant's Residence Address:

U.S. Bureau of Prisons

July 10, 1992
Date of Imposition of Sentence

/s/ John F. Nangle
Signature of Judicial Officer

Honorable John F. Nangle
United States District Judge
Name & Title of Judicial Officer

JULY 14, 1992
Date

ATTEST: A TRUE COPY

Certified to JUL 15 1992 19__

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to each of Counts 1 and 2, to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be allowed to serve his period of incarceration at either FCI Lompoc, CA, FCI Terminal Island, CA, or FCI Pleasanton, CA.

[x] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at _____ a.m. / p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____,
with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

_____

HERNAN O. CASTRO
Reg. # 73026-011
P. O. Box 3007
San Pedro, CA 90731-0207

In Pro Se

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA, Plaintiff, v HERNAN O'RYAN CASTRO, Defendant.	) CR 491-142)) MOTION FOR NEW) TRIAL PURSUANT) FEDERAL RULES) OF CRIMINAL) PROCEDURES,) RULE 33.)) (Filed Jul. 11, 1994)

COMES NOW HERNAN O'RYAN CASTRO, in Pro Se, a Defendant herein, and moves this Honorable Court to order a new trial, in the case of Defendant, pursuant to Federal Rules of Criminal Procedures, Rule 33.

In the alternative, Defendant requests an evidentiary hearing.

This 5th day of the month of July, 1994.

/s/ Hernan O. Castro
HERNAN O. CASTRO
IN PRO SE

_____

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to entertain a motion for new trial pursuant to Federal Rules of Criminal Procedures, Rule 33.

> "Evidence discovered post trial [ ] is properly considered by the district court in a motion for a new trial pursuant to Fed. R. Crim. Pro. 33." [*U.S. v. Bascaro*, 742 F.2d 1335, 1344 (11th Cir. 1984)]

Because Defendant's motion for new trial is based on newly discovered evidence, it can be presented to this court within two years from final judgment.

> "A motion for new trial based on the grounds of newly discovered evidence may be made only before or within two years of final judgment." [Fed. R. Crim. Pro., Rule 33]

AND,

> "For the purpose of [Fed. R. Crim. Pro. 33], 'final judgment' is defined as the date on which the appellate process is terminated, and the appellate process is terminated when appellate court issues its mandate of affirmance." [*U.S. v. Cook*, 705 F.2d 350 (D.C. Cir., 1983)]

The Eleventh Circuit United States Court of Appeals denied Defendant's Petition for Rehearing on May 11, 1994.[1A] The Mandate was stayed pending Defendant's

[1A] United States Court of Appeals for the Eleventh Circuit's denial of Defendant's Petition for Rehearing of his direct appeal is attached hereto and incorporated herein by reference as Exhibit A1.

Petition for Writ of Certiorari to the United States Supreme Court.

STATEMENT OF ISSUES

A. The government violated the *Brady* doctrine, as held in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by not disclosing the government's agreement with its main witness against Defendant.

B. The government violated the *Giglio* doctrine, as held in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), when it knowingly introduced perjured testimony by two of its witnesses, at Defendant's trial.

STANDARD OF REVIEW

Unlike common cases of motion for new trial, based on newly discovered evidence, which require a more stringent four prong inquiry[1], claims of violation of the *Brady-Giglio* doctrines, use a more lenient standard.

A. A defendant that seeks a new trial based on a *Brady* violation, must show:

[1] A defendant that seeks a new trial based on newly discovered evidence normally must show that: "(1) the evidence must be newly discovered and have been unknown to the defendant at the time of the trial; (2) the evidence must be material, and not merely cumulative or impeaching; (3) the evidence must be such that it probably produce an acquittal; and (4) failure to learn of such evidence must not be due to lack of diligence on the part of the defendant." [*U.S. v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988), cit. omitted]

(1) That the government possessed evidence favorable to the defendant (including impeaching evidence); (2) that the defendant does not possess the evidence, nor could he obtain it himself with any reasonable diligence; (3) that the prosecutor suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [U.S. v. Swindall, 971 F.2d 1531, 1556 (11th Cir. 1992), cit. omitted]

B. A defendant that seeks a new trial based on the government's knowing use of false testimony is required to prove:

(1) That the prosecution's case included perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. [*U.S. v. Agurs*, 427 U.S. 97, 103, 49 L.Ed.2d 312, 349, 965 S.Ct. 2392, 2397 (1976)]

INTRODUCTION.

Defendant HERNAN O'RYAN CASTRO, was convicted on April 10, 1992, after a five days jury trial, of Conspiracy to Possess with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841 and 846, and of Conspiracy

to Import Cocaine, in violation of 21 U.S.C. §§ 952, 960 and 963[2].

STATEMENT OF FACTS

On November 19, 1991, Castro filed a Motion for Disclosure of Impeaching Evidence[3].

During Castro's trial the Government's main witness against him was Government informant Lynn Lowe.

On page one of Castro's Motion for Disclosure of Impeaching Evidence [Exhibit B], Castro requested:

"Any and all records and information revealing prior misconduct or bad acts attributed to each witness."

And,

"Any and all considerations or promises of consideration given to or on behalf of the witness. . . ."

On page two of the same motion [Exhibit B], Castro requested:

"Any and all criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against the witness, and any civil, tax court, court of claims, administrative, or

---

[2] Castro's Order of Judgment and Commitment attached hereto and incorporated herein by reference as Exhibit A.

[3] Attached hereto and incorporated herein by reference as Exhibit B.

other pending or potential attributed to each witness."

Finally, on page three, of the same motion [Exhibit B], Castro requested:

"Any and all other records and/or information which could arguably be helpful or useful to the defense in impeaching or otherwise detracting from probative force of the Plaintiff's evidence or could arguably lead to such records or information."

On December 2, 1991, the Government filed a Preliminary Statement Re Discovery[4], in response to defendants' various pre-trial motions.

On page four of the Government's response [Exhibit C], it states:

"Also seven (7) days prior to the trial the government will file an exculpatory evidence and *Brady-Giglio* notice. Criminal histories of any government witnesses will be set forth. . . . "

The Government never filed any information with regard to Lynn Lowe's prior bad acts, nor about her Immunity Agreement[5].

During Junji Yamamoto's trial (one of Castro's co-defendants, who was tried separately, on March 10 and 11, 1993), Government witness Lynn Lowe testified that she

[4] Attached hereto and incorporated herein by reference as Exhibit C.

[5] Attached hereto and incorporated herein by reference as Exhibit D.

had entered into an Immunity Agreement with the United States Attorney's Office for the Southern District of West Virginia, in November 16, 1987[6].

I. THE GOVERNMENT WITHHELD *BRADY* MATERIAL.

It is well established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [*United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989), quoting *Brady v. Maryland*, supra, 373 U.S. at 87.] "When the reliability of a witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within th[e] general rule of [*Brady*]." [*United States v. Giglio*, supra, 405 U.S. at 154. See *United States v. Bagley*, 473 U.S. 667, 676 (1985)]. And, "[i]mpeaching evidence, [ ] as well as exculpatory evidence, falls within the *Brady* rule." [*Meros*, supra, at 1308, quoting *Bagley*, supra, 473 U.S. at 676]

In order to establish a *Brady* violation a defendant must prove:

"(1) [T]hat the Government possessed evidence favorable to the defendant (including impeaching evidence), [*Bagley*, supra]; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence [see *United States v. Valera*, 845 F.2d 923,

[6] Pertinent part attached hereto and incorporated herein by reference as Exhibit E.

927-28 (11th Cir. 1988)]; (3) that the prosecution suppressed the favorable evidence [see *United States v. Burroughs*, 830 F.2d 1574, 1577 (11th Cir. 1987)], and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different [see *Bagley*, supra, 473 U.S. at 682]." [See *Meros*, supra, at 1309].

FOUR PART INQUIRY

(1) The first part of the four part inquiry refers to the knowledge on the part of the Government of the withheld evidence.

Lynn Lowe's Immunity Agreement was executed in 1987 with the United States Attorney's Office for the Southern District of West Virginia. [See Exhibit D]

The United States Attorney's Office for the Southern District of Georgia was not involved in the agreement reached between the United States Attorney's Office in West Virginia and Lynn Lowe (who used the name of Lynn Campbell for the agreement) [see Exhibit D]. In fact, the United States Attorney's Office for the Southern District of Georgia was not involved in Yamamoto's investigation until D.E.A. Special Agent Douglas L. Driver (S/A Driver), the agent that initiated the investigation into the alleged drug trafficking activities of Junji Yamamoto, was transferred from DEA's Office in Denver, Colorado, to Savannah's DEA Office, in mid 1990[7].

[7] Pertinent part of Castro trial transcripts attached hereto and incorporated herein as Exhibit F.

But, "the prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed for these purposes to the Government." [*Giglio*, supra, 405 U.S. at 154. See *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978)]

Hence, even if the Assistant United States Attorney that prosecuted Castro had no personal knowledge of the existence of the Immunity Agreement, the knowledge of its existence can be *attributed* to him. With minimal diligence of his part, he could have found out about Lynn Lowe's Immunity Agreement.

Furthermore, the United States Attorney's Office for the Southern District of West Virginia, and Assistant United States Attorney Joseph Savage, Jr., were involved in the negociations and Pre-charge Agreement entered by Michael Lowe[8] (Lynn Lowe's husband at the time of the investigation that ended in the indictment and prosecution of Castro), and the Immunity Agreement entered by Lynn Lowe.

Moreover, S/A Driver, who investigated the case against the defendants throughout the period of two and a half years that the investigation lasted, was in telephonic contact with Assistant United States Attorney Nancy Hill (whom replaced Joseph Savage, Jr.), as she stated to the Sentencing Court, in the Southern District of West Virginia, that sentenced Michael Lowe on November 21, 1989[9].

[8] Attached hereto and incorporated herein by reference as Exhibit G.

[9] Pertinent part of Michael Lowe's Sentencing Hearing attached hereto and incorporated herein by reference as Exhibit H.

It is also possible that S/A Driver, a member of Castro's prosecuting team, had knowledge, through his communications with Assistant United States Attorney Hill, of Lynn Lowe's Immunity Agreement.

In any event, the Government cannot dispute that it had knowledge of the existence of Lynn Lowe's Immunity Agreement.

(2) Castro and his counsel didn't learn about the existence of the Immunity Agreement until it was produced at the trial of co-defendant Junji Yamamoto, in March of 1993, almost a year after Castro's trial.

Castro could not, nor his counsel, obtain the agreement with any diligence. First, the Government concealed from the defense the fact that Lynn Lowe was involved in drug trafficking (which on it's own is a separate *Brady* violation), hence, the defense had no reason to suspect that there was an agreement between the Government and Lynn Lowe. Second, the agreement between the Government and Lynn Lowe, and possibly the investigation of Lynn Lowe's criminal activities, were under the alias of Lynn Campbell (or Lynn Woosley), which would have made very difficult to locate the withheld information, even if the defense had had knowledge of Lynn Lowe's criminal activities.

Thus, even with a reasonable amount of diligence, it would have been impossible for the defense to obtain the necessary information leading to the agreement without the help of the Government.

(3) As discussed above, knowledge of the existence of the Immunity Agreement can be attributed to the prosecuting team, and the agreement's existence was not disclosed

until after Castro's conviction. It follows that the Government suppressed the information about the existence of the Immunity Agreement.

(4) In ascertaining whether the withholding of impeaching evidence was material, we must review the record to find out how much did the testimony of Lynn Lowe influenced the jury on it's decision.

Lynn Lowe was one of four witnesses that testified against Castro at his trial. Two of the other witnesses, Savannah's Task Force Officer Irvin Ray (TFO Ray), and D.E.A. Special Agent Paul Boulad (S/A Boulad) testified about statements allegedly made by Castro after his arrest. They told the jury that Castro had told them that he had gone to Minneapolis, on August 11, 1990, on behalf of Junji Yamamoto, and to meet a female for the purpose of negociating a sale of cocaine, because the female was interested in purchasing a large amount of drugs[11].

The other witness to testify against Castro was Special Agent John Boulger, of the Minnesota Bureau of Criminal Apprehensions. He testified that he had observed the meeting between Castro and Lynn Lowe, that took place at the Minneapolis/Saint Paul Airport[12].

Two pieces of evidence were introduced by the Government. One was a telephone/address directory, that

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[11] Pertinent parts of Castro's trial transcript attached hereto and incorporated herein by reference as Exhibits J (testimony by TFO Ray) and K (testimony by S/A Boulad), respectively.

[12] Pertinent part of Castro's trial testimony attached hereto and incorporated herein by reference as Exhibit L.

included Junji Yamamoto's name and telephone number. The other was a business card of Junji Yamamoto.

The government also introduced testimony by S/A Driver, with regard to two telephone conversation he had with Yamamoto in late March, 1991. The first one was recorded, and in it Yamamoto concedes that an individual from his San Francisco branch office met with Lynn Lowe. Yamamoto also stated that it "could be possible" to obtain a sample of what could be inferred to be cocaine from the individual that met Lynn Lowe, but that he would have to check first.

S/A Driver also testified that on March 27, 1991, Yamamoto called him to tell him that he (Yamamoto) would put S/A Driver in touch with his Los Angeles representative, instead of his San Francisco representative (telephone conversation not recorded)[13].

Lynn Lowe testified that on August 11, 1990, Yamamoto contacted her to tell her that a friend of his would call her. That later the same day Castro contacted her, and arrangements were made for her to meet him at the Minneapolis/St. Paul Airport later the same day. She further testified that at the meeting with Castro, he told her that he could supply any amount of cocaine that their (the Lowe's) customer needed. She testified that Castro told her that the price of one kilogram of good quality

[13] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit M. Transcript of Castro's trial Government Exhibit "10-A, attached hereto and incorporated herein by reference as Exhibit N.

cocaine would go up from a price previously discussed between Yamamoto and Michael Lowe, to $25,000.00[14].

From all of the above it is obvious that without Lynn Lowe's testimony, about her unrecorded conversation with Castro at the Minneapolis/St. Paul Airport, on August 11, 1990, it would have been unlikely that the jury would have convicted Castro.

Hence, Lynn Lowe's credibility was central to the Government's case against Castro.

The fact that Lynn Lowe had been involved in drug trafficking, and that she had entered into an Immunity Agreement with the Government, would have given a reason for the jury to either doubt, or to have evaluated more carefully Lynn Lowe's testimony.

She was presented to the jury, by the prosecutor, in closing argument, as a cooperating witness that "had no incentive"[15] to testify. The prosecutor said that Lynn Love was testifying simply because she had been subpeonaed. [Exhibit P]

At Yamamoto's trial, after discovery of the agreement, the Government argued that the agreement was not the reason for Lynn Lowe to testify at Yamamoto's trial.

The Government based its argument on part of the second paragraph of the Immunity Agreement, that says:

[14] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit O.

[15] Pertinent part of Castro's trial transcript attached hereto and incorporated herein by reference as Exhibit P.

> "[Lynn Lowe] will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigations as a confidential participating informant for the purpose of the investigation of various narcotics related crimes in the Southern District of West Virginia and elsewhere. [Lynn Lowe] will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of execution of this agreement." [Exhibit D]

Lynn Lowe's Immunity Agreement was executed on November 16, 1987.

There is no evidence, up to this date, to the effect that Lynn Lowe fulfilled her part of the agreement with the Government, and that for the period of time between November 16, 1987 to November 15, 1988, she acted in the capacity of a participating confidential informant.

Furthermore, her agreement, as claimed by the Government at Yamamoto's trial, was restricted to investigating the drug trafficking activities of her co-conspirators in the activities that resulted in Lynn Lowe's agreement, namely, the transportation of about 60 ounces of cocaine from Florida to Logan County, West Virginia, on behalf of Michael Lowe.

But, in his Grand Jury testimony, in the Southern District of Georgia, on July 30 1991[16], Michael Lowe

[16] Pertinent part attached hereto and incorporated herein by reference as Exhibit Q

testified that the cocaine that he was obtaining from Florida, was supplied by Yamamoto. This would make Yamamoto one of Lynn Lowe's co-conspirators, and his investigation would be part of the agreement, together with the investigation of anybody connected to Yamamoto's alleged drug trafficking activities.

But even if Lynn Lowe did not participate in the investigation of Yamamoto pursuant to the Immunity Agreement, this didn't relief her from her duties, as stated in the last part of the second paragraph of the Immunity Agreement, and that states:

> "[Lynn Lowe] responsability to participate as a witness in prosecutions in which she may be involved pursuant this agreement shall continue until such time as the prosecutions are completed." [Exhibit D]

Lynn Lowe had a responsability to testify at *any* prosecution that came from the investigation related to her own drug trafficking activities. Not just the cases where she participated as a confidential participating informant.

Without a doubt, Lowe was testifying at Castro's trial pursuant her agreement with the Government, and the jury had a right to know this fact.

The knowledge of the existence of the incentive for Lynn Lowe to testify would have put the jury on notice that Lynn Lowe may have also had a motive to commit perjury, in her attempt to please the federal authorities.

Assuming, arguendo, that the agreement did not play a part in Lynn Lowe's testimony at Castro trial, the fact that the jury was not made aware of Lynn Lowe's drug

related activities and of the Immunity Agreement, casts a doubt on the result of Castro's trial. It may have made a difference if the jury had been aware of Lynn Lowe's past and her agreement with the Government. The withheld evidence would have been the only impeaching evidence available to the defense. Used skillfully, it would have, at a minimun, undermined the credibility of the witness in the eyes of the jury.

On the other hand, the withheld information could be only the "tip of the iceberg". [See *United States v. Griggs,* 713 F.2d 672, 674 (11th Cir. 1983)]

It should have been left for the jury to decide if Lynn Lowe was testifying pursuant to her agreement with the Government or not. They never had a chance to consider this evidence, because the Government withheld it from the defense.

The evidence of Lynn Lowe's Immunity Agreement was material to Castro's guilt or innocence, because it was material to the credibility of Lynn Lowe, who's testimony alone was responsible for Castro's conviction.

II. THE GIGLIO VIOLATIONS.

It is well established that:

> "The constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured." [*Alcorta v. Texas,* 355 U.S. 28 (1957)]

And,

> "[t]he due process principal that [the Government] may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness." [*Napue v. United States,* 360 U.S. 264, 269 (1959)]

PERJURY BY GOVERNMENT WITNESS LYNN LOWE

(1) At Castro's trial, during cross examination of the Government's witness Lynn Lowe by Castro's counsel[17], the following exchange took place:

> "Q: . . . . Have you ever been involved in drugs?.
>
> A: No, just my knowledge with Michael [Lowe]."
>
> [Exhibit R]

During cross examination of the same witness, at Yamamoto's trial, Lynn Lowe conceded that she had been involved in the transportation of about 60 ounces of cocaine, from Florida to Logan County, West Virginia[18].

At Castro's trial the Government made no attempts to correct the false testimony of the Government witness, when in fact, the Government, if not the prosecutor personally, knew that the witness was committing perjury.

---

[17] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit R.

[18] Pertinent part of Yamamoto's trial transcripts attached hereto and incorporated herein by reference as Exhibit S.

(2) At Castro's trial, during direct examination of Lynn Lowe[19] the following exchange took place:

> "Q: And you also knew at this point that the assistance you were providing to DEA would also be considered as benefit that was being provided by Mike [Lowe] as well?.
>
> A: Yes, sir. *That was the reason for doing it at the time.*
>
> Q: What is your current relation with Mike Lowe?.
>
> A: We are still married but separated. I am filing for divorce."
>
> [Exhibit T]

From the above exchange, the prosecutor stated in his closing argument[20]:

> "[Lynn Lowe] is not a cooperating defendant but a cooperating witness who is attempting to help her husband whose [sic] in trouble. There's no, there's no surprise there. There's nothing hidden there. That's what she was doing. Now the difference is that at the time that she was doing these things, that was true. Mike Lowe has been in jail since 1989. They've been separated since that time. She told you she hadn't gotten around to doing it yet, but she is filing a divorce from this guy and that's it. There's no further relationship with [sic] them. . . . So Lynn Lowe no longer has this incentive that they are going to

[19][20] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibits T and U respectively.

> argue to you. She came here now as a subpoenaed witness and testified about what happened." [Exhibit U]

At Yamamoto's trial, Lynn Lowe conceded that in 1987 she had entered into an Immunity agreement with the United States Attorney's Office for the Southern District of West Virginia [see Exhibit E], whereby she agreed to:

> "[Lynn Lowe] will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigations as a confidential participating informant for the purpose of the investigation of various narcotic related crimes in the Southern District of West Virginia and elsewhere. [Lynn Lowe] will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of the execution of this agreement. [Lynn Lowe's] responsability to participate as a witness in prosecutions in which she may be involved pursuant this agreement shall continue until such time as the prosecutions are completed." [Exhibit D]

The Immunity Agreement was signed on November 16, 1987, in exchange for a promise not to prosecute Lynn Lowe (who used the name of Lynn Campbell) in relation to her transportation of about 60 ounces of cocaine from Florida to Logan County, West Virginia. [See Exhibit S]

Based on all of the above, it is clear that Lynn Lowe testified at Castro's trial pursuant to her Immunity Agreement. This agreement encompassed the trial in the instant matter, since Castro's investigation is tied to the

Yamamoto investigation. According to Grand Jury testimony of Michael Lowe, it was Yamamoto who allegedly supplied the 60 ounces of cocaine that Lynn Lowe transported from Florida to West Virginia. [See Exhibit Q]

Hence, Lynn Lowe committed perjury during Castro's trial, when she stated that she was testifying under no pressure from the Government.

The prosecutor, as a member of the Untied States Attorney's Office, knew or should have known about the Immunity Agreement Lynn Lowe had signed.

And with this knowledge, he subornated Lynn Lowe's perjury by telling the jury, in closing argument, that Lynn Lowe was testifying without incentives. [See Exhibit U].

PERJURY BY T.F.O. IRVIN RAY.

(3) At Castro's trial, the following exchange took place at the cross examination by Castro's counsel of Savannah's Task Force Officer Irvin Ray[21], who participated in Castro's arrest on August 5, 1991:

"Q: Yes, I mean, give us a description of how you arrested [Castro] please?

A: Yes, sir. Myself and another agent walked down the stairs; went over there; and he drove up, we advised him that we needed to talk to him. And walked him upstairs, and we advised him at the time that he was

[21] Pertinent part of Castro's trial transcript attached hereto and incorporated herein as Exhibit V.

under arrest, that we had an arrest warrant for him from the Southern District of Georgia.

Q: Did you show any gun at the time?

A: No, sir.

Q: You did not point a gun?

A: No, sir.

Q: Did any other agent point a gun at him?

A: No, sir, myself and one other agent went down there, the other one was standing at the top of the balcony."

[Exhibit V]

D.E.A. Special Agent Paul Boulad testified at Castro's trial[22]. He was another of the agents present at Castro's arrest, and he stated with regard to the same incident the following:

"Q: Did anybody point a weapon at [Castro] at the time he was arrested?

A: There is a possibility that a weapon had been pointed at him; yes sir."

[Exhibit W]

Castro was surprised by TFO Ray's perjurious statement and so was his attorney, who inquired repeatedly, as reflected by the record [Exhibit V], to make sure that TFO

[22] Pertinent part of the trial testimony of S/A Boulad attached hereto and incorporated herein as Exhibit W.

Ray's statement was not due to a misunderstanding. Castro and his attorney had no evidence available at the time to present to the jury to rebut TFO Ray's falsity, because of the unexpected of the statement, short of having Castro take the stand to verbally contradict TFO Ray's falsity.

After trial, and armed with the knowledge of TFO Ray's perjured testimony, Castro came across an eyewitness to his arrest. Castro obtained a sworn declaration from this witness, which is attached to this motion, including Castro's own sworn declaration as to the events of arrest[23].

This declaration supports Castro's position that TFO Ray committed perjury in his trial, when Ray testified that neither him, nor any member of the arresting team had drawn weapons at Castro during his arrest, when in fact at least two of them did point guns at him, prior and during his arrest.

DISCUSSION.

As stated above, Castro must prove that (1) the prosecution's case included perjured testimony, (2) the prosecution knew or should have known of the perjury, and (3) there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. [See *United States v. Agurs,* supra, 472 U.S. at 103]

[23] Declarations by Deborah J Powers and Castro attached hereto and incorporated herein as Exhibits X and Y respectively.

The Supreme Court, in its decision in *Bagley,* supra, stated:

> "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." [Agurs, supra, 427 U.S. at 103]
>
> "Although this rule is stated in terms that treats the knowing use of perjured testimony as error subject to the harmless error review, it may as easily be stated as a materiality standard under which *the fact testimony is perjured is considered material* unless failure to disclosed it would be harmless beyond a reasonable doubt."
>
> [Bagley, supra, 473 U.S. at 479-80]

(1) THE PERJURY.

There is no doubt that Lynn Lowe committed perjury. She answered falsely when asked if she had ever been involved in drug trafficking, and again she answered falsely when asked by the prosecutor about her reason for testifying. On this last issue, as discussed above, Lynn Lowe was testifying pursuant to the Immunity Agreement she entered in November 16, 1987, with the United States Attorney's Office for the Southern District of West Virginia. This agreement states that Lynn Lowe's "responsability to participate as a witness in prosecutions in which she may be involved pursuant [the] agreement shall continue until such time as the prosecutions are completed." [See Exhibit D].

As stated above, Lynn Lowe was to participate actively in the investigation of his co-conspirators in the drug trafficking activities that were the reason for her to enter into the Immunity Agreement with the Government, and Yamamoto was, as discussed above, one of such co-conspirators. Hence, Lynn Lowe was bound by her agreement to testify against Yamamoto and any of his alleged co-conspirators.

Even though Lynn Lowe and the Government denied it, is clear that Lynn Lowe acted as a participating confidential informant in this case, pursuant her Immunity Agreement, when she actively got involved in the investigation of Yamamoto's alleged drug trafficking activities.

There were circumstances that would have forced her to cooperate pursuant the agreement, i.e., that she hadn't fulfilled her side of the agreement by participating in the investigations related to her drug trafficking activities during the time period required by the agreement.

The cooperative agreement that Michael Lowe entered with the Government in 1987 (Exhibit G), was similar to Lynn Lowe's Immunity Agreement. The only difference was that rather than having been given immunity for his participation in the offenses that were the reason for the agreement, the Government had the option to indict Michael Lowe, if at the end of the one year period from the execution of the agreement, he had not produced.

Although it was never stated by the Government, Michael Lowe did not produce. Michael Lowe was not indicted at the end of the one year period. His indictment was postponed once he started working with S/A Driver, in January of 1989.

It must be remembered that Lynn Lowe went with Michael Lowe to Jamaica in 1988[24], and met with Junji Yamamoto. At this point she was clearly participating in the investigation of Yamamoto.

Michael Lowe's help was deemed not to be productive. The United States Attorney's Office for the Southern District of West Virginia decided in April of 1989 to indict Michael Lowe[25], and subsequently he entered into a new agreement with the Government[26], this time in exchange for a recommendation of leniency from the United States Attorney's Office.

It is obvious that Michael Lowe participated in the investigation of Yamamoto, until a new agreement was reached, under the terms of his original agreement. This was well past the one year period contemplated by the original agreement.

As discussed above, the two agreements, Lynn Lowe's and Michael Lowe's were negotiated by the same Assistant United States Attorney.

With regards to TFO Ray's perjury, logic and the declarations of the eyewitness and Castro are enough to prove that he made a concious decision to lie at Castro's trial.

---

[24] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit AA.

[25] Attached hereto and incorporated herein by reference as Exhibit BB.

[26] Attached hereto and incorporated herein by reference as Exhibit CC.

(2) GOVERNMENT'S KNOWLEDGE OF THE PERJURY.

Lynn Lowe's drug trafficking activities was known to U.S. Attorney's Office in West Virginia, hence that knowledge can be attributed to the Government. Therefore, the neglect by the Assistant U.S. Attorney that prosecuted Castro to obtain this readily available information, is no excuse, and the knowledge of Lynn Lowe's criminal activities would be attributed to him. [See Giglio, supra, 405 U.S. at 154]

With regard to Lynn Lowe's perjury in relation to her Immunity Agreement, the prosecutor, as stated above, should have known about the agreement. Even if he neglected to properly research the background of the Government witness, this would not exonarate him from the responsability to disclose the false testimony when it was offered.

Therefore, he should have known that Lynn Lowe was committing perjury.

Further, he benefited from this perjury, as he referred to Lowe's lack of incentive, in his closing argument. [Exhibit U]

Because Ray was a member of the prosecuting team, the prosecution can be attributed with the knowledge of his perjury.

> "Since . . . investigative officers are part of the prosecution, the taint in the trial is no less if they, rather than the prosecutor were guilty of nondisclosure. [ ] Knowledge by police or investigators [of the perjury] is therefore imputed to the prosecution under *Brady*."

> [United States v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989) citation omitted]

Obviously TFO Ray knew he was commiting perjury.

Therefore, the prosecution had knowledge of the three instances brought by Castro, where the prosecution's witnesses committed perjury either on direct or cross examination.

(3) MATERIALITY.

The final requirement for the defendant to obtain a new trial is that the perjury must be material.

> 'Evidence is material for the purpose of *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

[*Jacobs v. Singletary*, 925 F.2d 1282, 1289 (11th Cir. 1992)]

It is well established that,

> "when 'the prosecutor's failure to correct a witness' false testimony will warrant a reversal. When [ ] the "estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." [*United States v. Rivera Pedin*, 861 F.2d 1522, 1530 (11th Cir. 1989) citations omitted]

Furthermore,

> "[a] jury may very well give great weight to a precise reason to doubt credibility, when a

witness has been shown to be the kind of person who might perjure [it]self."

[*United States v. Sanfilippeo*, 564 F.2d 176, 178 (5th Cir. 1977)]

As noted above, Lynn Lowe's testimony was responsible for Castro's conviction. Without her testimony (and information), the Government would not have been able to present a case to the Grand Jury, let alone to go to trial.

Had the jury been aware of Lynn Lowe's perjury, her credibility, on which the Government's case was based, would have been destroyed.

Further, the prosecutor received a rainfall from Lynn Lowel's perjury as he was able to argue the lack of "incentive" for his witness to testify. [See Exhibit U]

In relation to TFO Ray's perjury and as stated in *United States v. Espinosa – Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990),

'Discovery into the investigation might show that [the officer] has committed perjury [ ]. If so, *the discovered evidence would be beyond mere impeaching and a new trial would be necessary* to "remove the taint" from [defendant's] conviction.'

CONCLUSION.

Mr. Castro has presented numerous instances to this Court on which he bases his Motion for New Trial. It is submitted that any of them, standing alone, would be enough to support a new trial. Taken together they present a compelling case, that demonstrates that Mr. Castro is entitled to a new trial.

The crux of Castro's claim is that the Government used perjured testimony and breached it's "duty of full disclosure with respect to requested discovery materials. The end result of this is a conviction that is tainted by the Government's breach of it's duties and by it's subornation of perjury.

Mr. Castro has been denied his right to due process of law. The only avenue open to Mr. Castro, in light of this newly discovered evidence, is to request this Court to grant a new trial pursuant Federal Rules of Criminal Procedures, Rule 33. It is respectfully requested that this Court grant the Motion for New Trial based on the foregoing.

In San Pedro, California, this 5th day of the month of July, 1994.

/s/ Hernan O'Ryan Castro
IN PRO SE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CR 491-142
HERNAN O'RYAN CASTRO,	)	
Defendant.	)	

EXHIBITS

MOTION FOR NEW TRIAL

PURSUANT RULE 33 F.R.C.P.

EXHIBITS

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EXHIBIT A

[Is reproduced *supra* at pages 3 to 6.]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA, Plaintiff, vs. JUNJI YAMAMOTO, CARLOS ENRIQUE CHANG aka CARLOS CHANG TSUTSUMI, HERNAN O'RYAN CASTRO aka HERNANDO TAN de CASTRO, BEATRIZ "BETTY" LARA-ARIAS, VICTOR MANUEL CHAVEZ, LARRY LEE TAYLOR, DAVID RHODES and RANDY WARREN, Defendants.	) No. 491-142)))))))))))))))

MOTION FOR DISCLOSURE OF IMPEACHING EVIDENCE AND INCORPORATED MEMORANDUM OF LAW

The Defendant, HERNAN O'RYAN CASRO, represented by his undersigned counsel, moves this Court for the entry of an Order directing the government to make inquiry and disclose, prior to trial, all of the following within its possession, custody or control, or the existence of which is known or by the exercise of due diligence could become known to the government:

1. Any and all records and information revealing felony convictions, guilty verdicts, or juvenile adjudications attributed to each witness called by the government, including but not limited to relevant "rap sheets."

2. Any and all records and information revealing prior misconduct or bad acts attributed to each witness.

3. Any and all consideration or promises of consideration given to or on behalf of the witness. By "consideration," the Defendant refers to absolutely anything of value or use, including but not limited to criminal, civil or tax immunity grants, assistance or favorable treatment or recommendations with respect to any criminal, civil, tax court, court of claims, administrative or other legal dispute with the government or any other parties, payments of money or fees, witness fees and special witness fees, provision of food, clothing, shelter, transportation or other like benefits, placement in a "witness protection program," and anything else which could arguably reveal an interest or bias in the witness in favor of the prosecution or against the defense or act as an inducement to testify or to color testimony.

4. Any and all criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against the witness, any probationary, parole or deferred prosecution status of the witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the government.

5. The existence and identification of each occasion on which the witness has testified before any court, grand jury, or other tribunal in relation to the facts of the case.

6. The existence and identification of each occasion on which each witness who is an informer, accomplice, or expert has testified before any court, grand jury, or other tribunal.

7. Any and all personnel files on any witness and the existence and identity of all government files on any witness.

8. The same records and information requested in Item 1 through 7 above, with respect to each non-witness declarant whose statements are offered in evidence.

9. Any and all other records and/or information which could arguably be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Plaintiff's evidence or which could arguably lead to such records or information.

MEMORANDUM OF LAW

I.

GENERAL CONSIDERATIONS

Due process requires that the government not suppress evidence favorable to the accused or discrediting to its own case, and upon request, that it disclose to the defense all such information. *Brady v. Maryland*, 373 U.S. 83 (1963). *See also Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942). The requirement of candor by the sovereign encompasses information that bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). As stated by the Supreme Court in *Napue*, 360 U.S. at 269:

> The jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

* * *

EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
v.	)	CR 491-142
JUNJI YAMAMOTO, ET AL.	)	

GOVERNMENT'S PRELIMINARY STATEMENT RE DISCOVERY

NOW COMES the United States of America, by and through Hinton R. Pierce, United States Attorney, and Terry L. Lloyd, Assistant United States Attorney, for the Southern District of Georgia, to inform the court and parties that the United States will not have a completely "open file" for discovery purposes in this case, but will provide the vast majority of the Government's file to the defense. The Government's position is as follows:

1.

The government will furnish the *Jencks Act* materials not previously disclosed five (5) days prior to trial (on the Wednesday preceding the Monday of trial). The government will accomplish this by giving a copy to A&E Reprographics and Supply Company, 101 E. Liberty Street, Savannah, Georgia 31401, 233-4400. Counsel may purchase a set from A&E. One set will be available in the United States Attorney's Office in Augusta for inspection during regular business hours after 12:00 noon on the Wednesday prior to the week of trial.

* * *

7.

Seven (7) days prior to trial the government will file an extrinsic evidence notice pursuant to Fed. R Evid. 404(b) and *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

8.

Also seven (7) days prior to trial the government will file an exculpatory evidence and *Brady-Giglio* notice. Criminal histories of any government witnesses and all considerations extended any government witnesses will be set forth. A copy of any plea agreements with co-defendants who will be testifying against those going to trial will be provided separately in the *Brady* disclosure.

9.

Because of the discovery the government has unilaterally provided herein, the government will oppose all requests for bills of particulars and lists of witnesses. Because of the extensive discovery provided, there can be no legitimate claim of surprise at trial. The indictment is legally sufficient; the essential elements of each offense are set forth in each count. *United States v. Gayle*, 936 F.2d 1234, 1236 (11th Cir. 1991); *United States v. Perkins*, 748 F.2d 1519, 1524-25 (11th Cir. 1984). The indictment is also reasonably circumscribed as to time and place so as to allow it to be pleaded in bar to prevent successive trials. Therefore, there is no bona fide need for a bill of particulars or list of witnesses.

* * *

EXHIBIT D

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

November 5, 1987 [Address Omitted in Printing]

S. Benjamin Bryant, Esquire
Schaub & Bryant, L.C.
111 West Virginia Building
Huntington, West Virginia 25701

RE: Lynn Campbell

Dear Mr. Bryant

It is agreed between the United States and your client, Lynn Campbell (hereinafter referred to as Ms. Campbell), as follows:

1. Ms. Campbell will be completely forthright and truthful with federal law enforcement agents regarding all inquiries made of her. In addition, Ms. Campbell will give truthful signed, sworn statements, grand jury testimony and trial testimony relative thereto. Furthermore, she agrees to be named as an unindicted co-conspirator and unindicted aider and abettor as may be deemed appropriate in any counts of any indictments which may be returned by a federal grand jury.

2. Ms. Campbell will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigation as a confidential participating informant for the purpose of the investigation of various narcotic related crimes in the Southern District of West Virginia and elsewhere. Ms. Campbell will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of the execution of this agreement. Ms. Campbell's responsibility to participate as a witness in any prosecutions in which she may be involved pursuant to this agreement shall continue until such time as the prosecutions are completed. At no time will Ms. Campbell take any steps toward furthering that investigation unless she is acting solely pursuant to the request and under the direction of one or more of the agents of the law enforcement agencies referred to above.

3. Nothing contained in any statement or testimony given by Ms. Campbell pursuant to this agreement or any evidence developed therefrom will be used against her directly or indirectly in any criminal proceeding. However, this agreement does not prevent Ms.

Campbell from being prosecuted for any violations of federal and state laws she may have committed should evidence of any such violations be obtained from an independent legitimate source, separate and apart from that information and testimony being provided by Ms. Campbell pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Ms. Campbell for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of her failing to be completely forthright and truthful as required by paragraph 1 above.

4. This written agreement constitutes the entire agreement between the United States and Ms. Campbell.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Joseph F. Savage, Jr.
JOSEPH F. SAVAGE, JR.
Assistant United States Attorney

JFS:lae

As evidenced by my signature at the bottom of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Lynn Campbell
LYNN CAMPBELL

11-16-87
Date Signed

/s/ S. Benjamin Bryant — Nov. 16, 1987
S. BENJAMIN BRYANT — Date Signed
Counsel for Lynn Campbell

EXHIBIT E

[75] Q And you're also aware of the fact that you were transporting drugs from the state of Florida up to West Virginia?

A I was not aware –

Q You never –

A – until a certain point that I was.

Q When did you become aware –

A And then I talked to a – I cannot think of the agent's name, but I talked to them and I entered into an agreement with them whereas I told them of the happenings with Mr. Lowe and what part I had involved in it.

Q When was this?

A This was in – I'm sorry – '87, '86-'87.

Q All right. And you entered into an agreement with an agent concerning transportation –

A With the government.

Q – of drugs from Florida.

A Right.

Q And you have previously testified to the grand jury that indicted Mr. Yamamoto you had no involvement with drugs of any nature or description.

A I was – the only questions I have ever been asked was did I use drugs or sell drugs. I was not asked if I went to Miami and brought drugs back.

Q Is that where you went to get drugs and bring them back?

* * *

EXHIBIT F

[173] DOUGLAS DRIVER

GOVERNMENT'S WITNESS, SWORN, TESTIFIES AS FOLLOWS

DIRECT EXAMINATION BY

MR. LLOYD:

Q (Mr. Lloyd) Agent Driver, if you would for the record, state your name.

A My name is Douglas L. Driver, D-r-i-v-e-r.

Q Where are you employed?

A I am a Special Agent with the U.S. Department of Justice, the Drug Enforcement Administration, and I am the agent in charge of the Savannah office.

Q If you would, tell the jurors a little bit about your background as a DEA agent.

A Well, I was hired in 1971. I was a police officer in Washington, D.C. I went through DEA training, and then I went to New York for three years, and then I went from there to Jacksonville, Florida where I stayed for about eleven years, and I transferred to Panama.

While I was in Panama, a fugitive was captured on a big case that I had worked on so I returned to Jacksonville for a lengthy trial. Following that – a trial which lasted almost about a year to a year and a half. I transferred to Denver and then while I was in Denver I was promoted to my supervisory position – current position here in Savannah. So, I transferred here in July of '90. 1990.

* * *

EXHIBIT G

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

September 21, 1987 [Address Omitted In Printing]

S. Benjamin Bryant, Esquire
Schaub & Bryant, L.C.
111 West Virginia Building
Huntington, West Virginia 25701

RE: Michael Lowe

Dear Mr. Bryant

This will confirm our conversations with regard to your client, Michael Lowe (hereinafter "Mr. Lowe"). As a result of these conversations, it is agreed by and between the United States and Mr. Lowe as follows:

1. Mr. Lowe will waive his right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of an information to be filed in the United States District Court for the

Southern District of West Virginia charging such offense or offenses, if any, as the United States considers appropriate. The United States Attorney's Office will consider the nature and extent of Mr. Lowe's cooperation and truthfulness in determining the specific charges to be brought, if any, and Mr. Lowe agrees to plead guilty to those charges. The United States agrees to delay in bringing any charges for a time period of one (1) year from the date of this agreement, during which time Mr. Lowe will act as a cooperating individual with federal law enforcement agencies. This prohibits the United States from prosecuting Mr. Lowe for a period of one (1) year for any crime or probation violation for which any federal agency presently has knowledge as of the date of this agreement noted above. It does not prohibit prosecution of Mr. Lowe at any time for any other offense about which the United States becomes aware through information separate and apart from that information provided pursuant to this agreement.

2. The United States Attorney's Office will also consider Mr. Lowe's request, if made, that he be permitted to enter a guilty plea in a jurisdiction other than the Southern District of West Virginia pursuant to Federal Rule of Criminal Procedure 20. The United States Attorney's Office does not in any way purport at this time to agree to any Rule 20 transfer nor does this agreement purport or give the consent of any other United States Attorney to a Rule 20 motion.

3. Mr. Lowe will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquiries made of him. In addition, Mr. Lowe will give signed, sworn statements, grand jury testimony and trial testimony relative thereto,

if the same is deemed necessary. During any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Lowe may have counsel present if he desires. Mr. Lowe agrees to take a polygraph test should same be requested by the United States.

4. Mr. Lowe will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigation as a confidential participating informant for the purpose of the investigating crimes in the Southern District of West Virginia and elsewhere. Mr. Lowe will act in the capacity of a confidential participating informant in the manner previously described for a period of at least one (1) year from the date of the execution of this agreement. Mr. Lowe's responsibility to participate as a witness in any prosecutions in which he may be involved pursuant to this agreement shall continue until such time as the prosecutions are completed. At no time will Mr. Lowe take any steps toward furthering that investigation unless he is acting solely pursuant to the request and under the direction of one or more of the agents of the law enforcement agencies referred to above.

5. Nothing contained in any statement or testimony given by Mr. Lowe pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by him. However, this agreement does not prevent Mr. Lowe from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from an independent, legitimate source, separate and apart from that information and

testimony being provided by him pursuant to this agreement. Nor does this agreement does not prevent the United States from prosecuting Mr. Lowe for perjury or the giving of a false statement to federal agents, if such a situation should occur by virtue of him failing to be fully forthright and truthful as required by paragraph 5.

6. The United States specifically reserves the right to use any information derived from Mr. Lowe, directly or indirectly, as evidence against Mr. Lowe should he refuse to plead guilty to the charges filed pursuant to paragraph 1 or otherwise violates this agreement. This decision shall be within the sole discretion of the United States Attorney's Office.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Lowe's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate.

8. There have been no promises or representations whatsoever made to Mr. Lowe by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court. However, the United States retains the right at final disposition to address the Court with respect to the nature and seriousness of the offense, to inform the Court of any relevant facts, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Lowe.

9. The United States Attorney's Office will exercise its efforts to place Mr. Lowe and his children in the Federal Witness Protection Program if the circumstances are appropriate for such placement which shall be determined within the sole discretion of the United States Attorney's Office and the United States Marshal Service.

10. If either the United States or Mr. Lowe violates any of the terms of this agreement, the other party will have the right to void this agreement.

11. This written agreement constitutes the entire agreement between Mr. Lowe and the United Stats in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Lowe in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Wayne A. Rich
WAYNE A. RICH
Chief, Criminal Division

By: /s/ Joseph F. Savage, Jr.
JOSEPH F. SAVAGE, JR.
Assistant United States Attorney

JFS:lae

As evidenced by my signature at the bottom of the four pages of this letter agreement, I have read and

understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Michael Lowe — /s/ Nov. 16, 1987
MICHAEL LOWE — Date signed
Defendant

/s/ S. Benjamin Bryant — /s/ Nov. 16, 1987
S. BENJAMIN BRYANT — Date signed
Counsel for Defendant

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA, v. MICHAEL LOWE, a/k/a JACK KENT CRIST, Defendant.	CRIMINAL NO. 2:89-00056 NOVEMBER 21, 1989 (Filed ___, 1990)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

NANCY C. HILL
Assistant U.S. Attorney
Charleston, West Virginia

FOR THE DEFENDANT:

MARY LOU NEWBERGER
Asst. Federal Public Defender
ROBERT P. MARTIN, Attorney
Charleston, West Virginia

COURT REPORTER:

BARBARA A. STEINKE, RPR-CM
500 Quarrier Street, Rm 5414
Charleston, West Virginia 25301
(304) 342-1671

* * *

[17] note from the individual whom he presumes to be the Japanese national to the effect that life is short and the implicit threat that was contained in that very brief message.

My question of you is really two-fold. One is whether those services were designed to be of valuable aid to the United States in investigation of drug smuggling and the like, and whether or not it is the case that Mr. Lowe has voluntarily subjected himself to considerable personal danger in attempting to assist the United States in that regard.

MS. HILL: Your Honor, I had a telephone conversation with the DEA agent. I'm not sure if I talked to Don Fox or Doug Driver. I have talked to both of those, who are DEA agents familiar with this situation in Denver, Colorado, throughout the last nine months. I started talking with him in February 1989, and I've talked with both of them periodically about this since that time. So I can't tell you which one I talked to last week, but I talked to one of them.

Just to give you a little bit of background as to what led up to this last conversation, when I first talked with the DEA agents out there and they told me that Michael Lowe had contacted them and agreed to assist them in investigating a case and had said that he had information about a major drug dealer, this Japanese guy, I told those DEA agents at that time that – and they were asking me or asking what the situation was with the plea agreement we had Michael Lowe under, we had [18] not filed any charges on, so it was a precharge agreement. And I told the DEA agents at that time what my experiences have been with Michael Lowe and what law enforcement officers experiences have been with Michael Lowe with West Virginia, which is they've lost confidence in him. He would come to them when he was facing trouble, say he could do this, say he could make a buy, say he could perform and produce, and it never materialized.

I shared that opinion with these DEA agents in advising that, but at the same time they felt that Michael Lowe had provided them valuable information and that he could work with them in an undercover capacity for some period of time. And I said fine, we will hold off on filing our charges and give you an opportunity to do that. Several months passed. This was in February 1989.

Several months passed and it was in the – I don't have the indictment in front of me, but whenever the indictment was filed in this case, I had had conversations with the DEA agents at that time. Although there had been some undercover contacts, no deals had gone down, nothing had materialized, and so we went forward with our charges here.

As the court is aware, we were set for sentencing here some thirty days ago, whenever it was, and at that time I had been advised by the DEA agents Doug Driver and Don Fox, both of them I was in contact with at that time, that the deal, it was

* * *

EXHIBIT J

[784] A Yes, sir.

Q After he was advised of his rights, did he indicate a willingness to talk to you, to you and the other agent?

A Yes, sir. After Mr. Goulard advised him of his rights, he agreed to cooperate and talk to us, and answer questions we wanted to ask him without an attorney being present.

Q Did he ever indicate in any way that he wanted an attorney prior to talking to you at that point?

A No, sir, he did not.

Q Any hesitancy at all in talking to you?

A No, sir.

Q Was he cooperative with you?

A Very cooperative.

Q If you would, please describe to the jury how the statement was made? What he said at first and what he said afterward?

A After Mr. Castro was advised of his rights by Mr. Goulard, myself and Mr. Goulard started asking him some questions. And we advised him that we had an arrest warrant for him out of the Southern District of Georgia for violation of narcotics laws.

We showed him the arrest warrant; and, we also showed him some pictures that were taken of him while he was in Minneapolis. And I asked him plainly, did he know who this individual was. And he said, "yes, it was me." And it was taken when he was in Minneapolis.

Q What did he say, if anything, about – initially about his [785] reason for going to Minneapolis?

A The reason he stated that he went to Minneapolis upon the request of Jungi Yamamoto. I asked him how did he know Yamamoto, and he continued telling us how he knew Yamamoto. And I asked him how he got in contact with Jungi Yamamoto.

He stated that he had his numbers and everything downstairs in his workshop in his basement.

Q All right, we'll get to that. But what else did he tell you?

A We continued talking, and up there in – we were in his living room. He was sitting on his couch. Roughly, that's around all he stated up there until we walked down to his basement where he had – because I told him I wanted to see the numbers and everything on how he contacted Jungi Yamamoto and all, and he went down to the basement area to his workshop.

Q Is this something he volunteered to do, to give you these numbers?

A Yes, sir.

Q All right. What did he do?

A We walked downstairs and he pulled out the list of numbers and give them to us and stated – showed me which ones was Jungi Yamamoto, and told me how he contacted him and everything.

We continued our conversation about the reason he went to Minneapolis, why Jungi Yamamoto had sent him to Minneapolis. And he stated that Yamamoto had sent him to Minneapolis for the [786] purpose of negotiating a business agreement with a female.

We continued talking. I asked him what kind of business agreement. He stated that it was him and Jungi Yamamoto were in the coffee import/export business. I then looked at Mr. Yam – Castro and told Mr. Castro, "Mr. Castro, I know the reason you went to Minneapolis." He downed his head and then he looked back up and said, "I'm going to tell y'all the truth."

He stated that, "I went to Minnesota or Minneapolis to negotiate the sale of cocaine with this lady because she wanted to purchase large quantities."

Q While down in the basement, did he produce a document for you?

A Yes, sir, he did.

Q I hand you the marked Government Exhibit "4 B", ask you to identify that?

A Yes, sir. This is the document that Mr. Castro gave to myself.

Q Was that the extent of his statement at that time?

A Yes, sir. That was the extent at that time.

Q All right. Backing up now in time to July 26, did you also participate in going with Agent Driver and Defendant Chickelero to Los Angeles?

A Yes, sir, I did.

Q And on July 26, did you participate in the surveillance of

* * *

EXHIBIT K

[774] previous surveillance. He looked at them and he admitted yes, that was him in the photographs. And then he said yes, he admitted that he was at that location.

Q All right. Let me hand you the photograph, a photograph, marked Government Exhibit "4 A" and ask you to look at those.

A These are the photographs, but these are enlarged.

Q All right. The photographs that you showed him were the same photographs just a smaller version?

A That's correct.

Q And you showed him those photographs and he admitted that it was him in the photographs?

A That's correct.

Q And did he indicate that those were pictures of him taken in Minnesota?

A I believe so. We knew where they had been taken, so he –

Q All right. If you would, just continue on just tell the jury what he said.

A Then to the best of my recollection he stated that yes, he was there. He had been sent there on behalf of an individual named Yamamoto. I think Minneapolis did come out evidently, and that he had gone there, and that it was at this Yamamoto's behest that he went.

And we ask him where he had met, Mr. Yamamoto. He said he had met him in prison.

[775] MR. WILLIAMS: Your Honor, I object to that, your Honor.

THE COURT: Well, I will sustain the objection. And the answer is stricken.

The jury is instructed to disregard it. It is not relevant or pertinent to the issues on this question.

Q (Mr. Lloyd) Agent Moulad, did he indicate why he went to –

A Evidently he went and said he was trying to negotiate a cocaine deal.

MR. LLOYD: Those are all the questions I have of this witness, Your Honor.

We will be calling Agent Ray for the continuation of this.

THE COURT: Mr. Williams, I take it.

Mr. Moore, you did not have any more questions? I did think you or Mr. Bennett.

MR. MOORE: No, sir.

THE COURT: Go ahead, Mr. Williams.

CROSS EXAMINATION BY

MR. WILLIAMS:

Q I'm Pomeroy Williams, and I am representing Mr. Castro in this trial.

A Yes, sir.

Q I have a few questions that I would like to ask you. How

* * *

EXHIBIT L

[393] A Yes, sir.

Q Okay. If you would, just basically tell the jury what happened?

A It was about twenty minutes till six that myself began observations of a male that was standing outside the airport terminal on the second level on the southend of the terminal.

I had a camera at that time, and I took some photographs of this person. We watched the person for about twenty minutes, and shortly after six o'clock, that person

went inside the terminal to the Northwestern Airlines counter; stayed there some period of time; went back outside; met a female, and they went inside the terminal to a bar called the Garden Bar in the northeast – the northwest part of the terminal but sat in the northeast section of the bar.

Q And about how long were they together?

A A little over an hour.

Q Did you take some photographs while they were meeting there in the bar?

A I did, yes.

Q I show you what's been marked as Government's Exhibit "4 A". If you would examine those photographs. Do you recognize those?

A I do.

Q And are those photographs that you took on that occasion?

A Yes, sir.

[394] MR. LLOYD: Your Honor, we would tender exhibit "4 A".

THE COURT: All right. I will rule on them at the end of the day. I will take care of all that then.

Q (Mr. Lloyd) Was any type of recording device placed on the woman who was there meeting with that person depicted in the photograph?

A No, sir.

Q Why was that?

A A number of reasons; first, the short notice of the meeting. Second of all, it is the first time the two persons had met, is my understanding, and normally we wouldn't do that on a first meeting between two persons because one may check the other person for a recording device.

And thirdly, we didn't have the equipment to do that.

MR. LLOYD: Those are all the questions I have.

THE COURT: Mr. Williams.

CROSS EXAMINATION BY

MR. WILLIAMS:

Q Officer Boulger?

A Yes, sir.

Q I'm Pomroy Williams, and I represent Mr. Castro. I believe that's his photograph you took.

A Yes, sir, they are.

Q You do see him in this room?

A He's seated behind you, sir, with the mustache and the

* * *

EXHIBIT M

[204] DOUG DRIVER: All right, bye

YAMAMOTO: Bye.

[NOTE: Tape concluded.]

MR. LLOYD: Judge, would you like to remove the transcripts or just put them in the base of their fee because we are going to play two more tapes for this witness.

THE COURT: They have all closed the book. If you want to keep them on your lap or put them on the floor, ladies and gentlemen, whichever is more comfortable, fine.

Q (Mr. Lloyd) Agent Driver, what was your cover? What was your undercover role? You mentioned –

A I told him that I was –

Q You mentioned in the tape it was some kind of business.

A I told him I was a business man, that I was opening restaurants here. And, that we were remodeling some places and – that, you know, I would be opening restaurants was essentially it.

Q What was these phone numbers that you gave him?

A One was for a number in my office that just answered "hello". It is an undercover number. And the other was at my residence.

Q All right. After that conversation with him, what happened next?

A A couple of days later, Yamamoto called me back and told me that he was going to put me in touch with his Los Angeles rep [205] instead of San Francisco rep. He was going to send somebody to me named Carlos, to deal with me.

Q All right. What happened after that?

A He sent two people from Los Angeles to Savannah. They had some phone calls with Lynn Lowe, and they had her come down from Minnesota and meet the two people. One was Carlos Chang Tsusumi, and the other was Albert Chickelero, both from Los Angeles.

They met in Atlanta, and the three of them came to Savannah and met with me. I met them in the lobby of the Hyatt Regency as Riverstreet.

Q Prior to this delivery occurring on April 11th, was there some telephone conversations between you and Carlos Chang and Junji Hamamoto to set this deal up?

A Yes.

Q All right. So what happened on April 11th of 1991? After they came to Savannah?

A When I walked into the Hyatt Regency, I met Lynn Lowe in the lobby, and Carlos Chang was off to the side in a little airline or travel agency.

A few minutes later we were joined by Chickelero. I was meeting Lynn Lowe for the first time. And we had a couple of minutes to talk before Chickelero and Carlos Chang came up and talked to us. And then they wanted to go right up to the room to delivery – they brought one kilogram sample of cocaine

* * *

EXHIBIT N

[200] to Tokyo, and I'm purchasing uh Colombian coffee here.

DOUG DRIVER: Yeah.

YAMAMOTO: And I am negotiating.

DOUG DRIVER: Wow.

YAMAMOTO: But that government control the exporting of coffee here.

DOUG DRIVER: Uh huh.

YAMAMOTO: So it's a little bit difficult to get it.

DOUG DRIVER: Well, Lynn's telling me she met one of your sales reps.

YAMAMOTO: Yeah, yeah, yeah, I know, he's in my office in San Francisco.

DOUG DRIVER: Uh huh.

YAMAMOTO: He's there because he speaks Spanish, you know.

DOUG DRIVER: Oh, okay, well.

YAMAMOTO: And that's my branch office in San Francisco

DOUG DRIVER: Well, is there any chance of the ladies going out there and meeting him, and getting uh a sample of the product line?

YAMAMOTO: Yeah, yeah, it can be possible.

DOUG DRIVER: Uh?

YAMAMOTO: It can be done.

[201] DOUG DRIVER: Okay, what – can you talk to him over the phone and maybe set something up?

YAMAMOTO: Let me check.

DOUG DRIVER: Okay.

YAMAMOTO: By the way, give me your home number

DOUG DRIVER: Okay, the – I'll give you two numbers; okay?

YAMAMOTO: Go ahead.

DOUG DRIVER: All right, 89 both, both of them are 912.

YAMAMOTO: 912.

DOUG DRIVER: Right, 897

YAMAMOTO: 897.

DOUG DRIVER: 9011.

YAMAMOTO: 9011.

DOUG DRIVER: And 236.

YAMAMOTO: 236.

DOUG DRIVER: 8110.

YAMAMOTO: 8110.

DOUG DRIVER: Now, that's – we're doing some construction so there's a lot of different people answering that phone.

YAMAMOTO: I see.

DOUG DRIVER: Okay, but that's where I usually am right now till we get this.

[202] YAMAMOTO: Can I just mention your name, Doug?

DOUG DRIVER: Yeah, oh, yeah.

YAMAMOTO: Okay.

DOUG DRIVER: But, you know, as long as –

YAMAMOTO: How are gonna make a business?

DOUG DRIVER: Well, what I was thinking is that, you know, I would still like to do some high volume kind of stuff with –

YAMAMOTO: Uh, yeah – no, no I don't want to know how you know –

DOUG DRIVER: Well, I was going to send the ladies out.

YAMAMOTO: I want to meet you, I want to meet and talk, you know, and discuss the small details.

DOUG DRIVER: Well, I was going to suggest that Lynn and my wife go out to San Francisco and meet.

YAMAMOTO: Oh, I see.

DOUG DRIVER: And meet your friend out there.

YAMAMOTO: Okay, okay okay, I understand

DOUG DRIVER: And –

YAMAMOTO: No, please wait about three or four days; okay?

DOUG DRIVER: Oh, okay.

YAMAMOTO: My, my friend contact with you.

DOUG DRIVER: All right. Is he going to call me

* * *

EXHIBIT O

[359] Q And, did you assist the investigation by setting up three way phone calls and those type things?

A Yes, sir, I did.

Q All right. Agent Driver has testified of these things so I am not going to go back through them again with you.

All right. Let us move back up to August 11th, 1990. What happened on that date?

A Well, on that day I got a phone call from first Junji Yamamoto stating that a friend of his would be calling. A man called identifying himself as Castro from the Minneapolis airport. And he wanted to meet with Mike. That was his reason for being there was to meet with Mike.

Well, Mike was in the Federal Prison. We could not get a hold of Doug in time to try to work out different arrangements. So Castro changed his ticket reservations and agreed to meet with me at the airport.

Q At the time that Junji Yamamoto called and told you about this meeting, had he ever done such a thing before?

A Well, he had said he was going to send someone but he never had. So it was a surprise when I did get the phone call. There was not really much time to do, you know, a whole lot.

Q So, in previous conversation he had told you that he was going to send somebody to the house?

A Right. Right.

Q But never did?

[360] A Never did.

Q And on this occasion he called you and told you he was sending someone?

A Right.

Q And then you received a call from a person?

A Right.

Q All right. And what did you do after this person called you the first time?

A Well, I called – first I called Doug and I talked to someone else. I do not really know who I talked to. Doug was not in.

Doug then called a little later and he told me just to go on to the airport, and he would call Minneapolis airport security and tell them – Castro had given me a description of what he was wearing and how I could recognize him.

Q When you talked to the person who identified himself on the telephone as Castro, what did he tell you that he wanted to do?

A He had come to talk business with Mike.

Q And what did you tell him about Mike?

A I told him Mike was in the hospital and that he could not, due to the time, that he could not; that the doctors did not want him to travel. It would be a four-hour trip, and it would be useless for him to come to Rochester unless he intended to spend the night. And he agreed to meet me.

Q What, if anything, did you tell him about your customer or [361] your moneyman?

A Well, I told him that Doug, who lived in Savannah, could not be there at the meeting but that Doug had the money, and had he called sooner or had it been arranged quicker, then Doug could have made the meeting also.

Q Did you have several phone calls with Castro during that day?

A I had at least four phone calls. He had given me the phone number for a telephone there at the airport where I could call him. It was just an exchange of phone calls letting him know when I would be there and trying to make sure I had gotten a hold of Doug. And then telling him what time the guy could be at the airport.

Q All right. I believe you said, finally, that Castro agreed to meet with you at the airport?

A Right.

Q What happened then?

A Well, I left. It is a two-hour drive from Rochester to Minneapolis. I got there about, sometime after six. When I got to the airport I was met by one of the agents at the airport who told me where to go and where Castro was.

I walked to where Castro was, and I recognized him because he had his leather jacket with him and a briefcase. And we walked from there to the – I guess you would call it a bar in the airport. We sat down and both ordered coffee. When we [362] first sat down we just mainly talked about ourselves, just kind of little personal things, weather, things like this. Then I proceeded to tell him that Doug had the money for the computers that he was there to talk to us about, and he said that he could supply all that Doug needed.

Q Okay. Ms. Lowe, if you could, try to put things in context so the jury could understand it. What exactly did you tell Castro about Doug?

A Well, that Doug was – that we had no money.

Q "We" being who?

A "We" being Mike and Lynn. Me. We had no money and that Doug was the man with the money who would buy and purchase the computers.

Q Where did that term come from?

A That was the term that Junji used. He either used computers or coffee. In this case, he used computers.

Q And what, if anything, did Castro tell you about his relationship with Junji?

A Well, he told me that he had known Junji for years, that they had – I think they had served time.

Q Did he indicate to you that he had –

MR. WILLIAMS: Your Honor, I object to any reference to "time" or anything.

THE COURT: We will let the record stand, and we will not develop it any further.

[363] MR. WILLIAMS: I just want my objection noted for the record, please.

THE COURT: All right.

Q (Mr. Lloyd) Did he indicate the reason that he came there was because of Junji; or, what did he say in that regard?

A Right, Junji had called him and ask him to come meet with Mike Lowe for the sale of some computers.

Q All right. Outline to the jury what was discussed about the computers.

A Well, the computers – one computer, he just used – the word "computer" was for a kilo of cocaine. During the discussion about the computers or the sale of the computers to Doug, he had told me that the price that had been discussed between Mike and Junji, which I was not a party to that discussion so I, you know, don't know the price that they discussed. But he said that the price would now be 25.

Q All right. So he made reference to a price that Junji had given Mike?

A Right. Right.

Q He said there was a new price?

A The new price would be 25.

Q Okay.

A And he could supply whatever Doug needed or wanted?

Q How did he refer to the quantities that he was talking about? What type of terms did he use?

[364] A Well, he used just – I am losing my train of thought here. One computer was one cocaine, one computer. Or if he went smaller, he used just small sample.

Q Did he give you a price for both going small and going for a –

A He gave me a price for small, but I really would rather not say because I am really not sure. I really do not remember the small price but he did give me a price.

Q All right. So he gave you a price for going small and he also gave you a price –

A Right.

Q – for going a whole one. And that was, what did you say? 25?

A Right.

Q Was there any discussion about the quality of the product?

A Said it was good quality.

Q What else was discussed?

A He said – well, after we finished their discussion on the price, he said that he would call. He checked to verify my phone number and address. And basically that was it. I walked him to his gate and watched him get on his plane.

Q Did he make any comment about meeting Junji shortly after your meeting?

A He did meet with Junji. He met with Junji. In fact, he was suppose to meet with Junji the next day.

[365] Q What did he tell you about that?

A Well, he said he was going to Panama, and that he would be meeting with Junji within the next day or so. He was flying back to San Francisco that night and leaving to meet with Junji.

I ask him if he had been comfortable with me and he said yes, and said he would call, which Junji did call.

Q Did he give you any indication as to whether or not you were going to be able to conduct some business?

A Yes, he said that he would be in touch to conduct business. That he would be calling.

Q Okay. Do you recall how he said it?

A He just said he would call and let me know how or when, or if he would be coming back – I did ask him if he wanted to come back to Minnesota. And he said he would, and I said next time rent a car, because he wanted to come in to meet Mike, so he would have to come into Rochester to do that.

Q I believe you indicated that after you – is there anything else about the conversation that you can recall?

A No, that really basically, I think that is about the whole of the conversation. We just – the biggest part of if at first like I said, was just talking about ourselves or, you know, just getting to know each other, feeling each other out.

Q I believe you stated that after you concluded your discussion you walked him into his terminal to get on his plane?

A Yes, I did.

[366] Q And after that point, what happened?

A I walked back, and was met by the other – one of the other agents and was taken up to their office where I called Doug Driver.

Q And told him what had occurred during the meeting?

A I told him.

Q Ms. Lowe, I know that was a while back when this meeting occurred, but looking around the courtroom do you see the person that you met here in this Court?

A Yes, sir, I do.

Q Would you point him out.

A He is right there.

Q And what is he wearing?

A He is wearing his suit, glasses, tie, white shirt.

MR. LLOYD: Let the record reflect that the witness has identified Hernan Castro.

THE COURT: So ordered.

MR. LLOYD: May I approach, Your Honor?

THE COURT: Yes.

Q (Mr. Lloyd) Now handing you what has been marked as Government Exhibit "4 A" and ask if you would look at that. Can you identify this?

A It's Castro, the man I met in the airport in Minneapolis.

Q And are those photographs of him during the time that you were meeting with him?

[367] A Yes, I as sitting across from him in this top one on this side behind the sign in the restaurant or bar.

Q Do those photographs fairly and accurately portray the events as they occurred that day?

A Yes.

Q All right. That meeting was on August 11th. In September did you have a conversation with Junji Yamamoto?

A Yes, I did. Junji called and wanted me to meet with him and Castro in Mexico, and I refused. I told this that I wouldn't cross the border that he could send Castro here or I would go to San Francisco, but I wouldn't go to Mexico.

Q Did you have other phone calls with Yamamoto in the months that followed that?

A I had many phone calls from Yamamoto. And in September and October they kind of, I guess – all the way through up into the events in March.

Q All right. In the early months of 1991, did you have a discussion with Doug Driver about trying to get something started?

A Yes, we – Junji again started saying that he wanted to get business going. So, we ask him to put us in touch with Castro, and he choose to use someone else.

Q Did you have some conversations with Yamamoto about why he switched from Castro to Carlos?

A He said he didn't trust Castro. That Castro hadn't done [368] what he had sent him there to do.

Q Referencing the meeting with you?

A Right.

Q So Yamamoto indicated that something had not been done that was suppose to have been?

A Right. Something had not been done that was suppose to have been done.

Q And so then in 1991, Yamamoto changed the focus to Carlos Cheng?

A Right.

Q And were you involved in some telephone conversations and discussions that evidently led to the delivery of the one kilo in Atlanta and then to Savannah?

A Right.

MR. LLOYD: Those are all the questions I have, Your Honor.

THE COURT: You gentlemen want to follow the same order?

MR. WILLIAMS: I would like to have a bench conference with Your Honor, please.

[NOTE: Sidebar Conference.]

MR. WILLIAMS: I would like to move for a mistrial, Your Honor, at this time. The Government was admonished to have their witnesses refrained from mentioning any prior convictions or time served in prison, and this witness just blurted this

* * *

EXHIBIT P

[971] Agent Driver was involved in a significant cartel-level trial in Florida in an investigation that he worked on.

He read about it and said, "well, that, that's the kind of agent I want to work with," and went to him. He had a person, Junji Yamamoto, who was, who was a world traveller in drug circles. And he went to Agent Driver and started giving him information. Got introduced to this person. Agent Driver met with him, as you know, on two occasions. They talked about large scale importations of cocaine into our country.

They met in Kingston, Jamaica in March of '89. They met in Costa Rice in December. Beatrice Lara-Arias, a contact of Junji Yamamoto comes in on that meeting, and

they discuss all of her Colombian contacts, how they can procure hundreds and hundreds of kilos of cocaine and bring it into this country.

Mike Low, becomes hospitalized because of his leg, but he also gets sentenced and goes to jail. So his availability is very limited. His wife, Lynn Lowe, as I'm sure the defense will point out, she was acting in hopes of her husband receiving a benefit from her continued cooperation.

She is not a cooperating defendant but she is a cooperating witness who is attempting to help her husband whose in trouble. There's no, there's no surprise there. There's nothing hidden there. That's what she was doing. Now the difference is at the time that she was doing these things, that was true. Mike Lowe has been in jail since 1989. They've been [972] separated since that time. She told you she hadn't gotten around to doing it yet, but she's filing a divorce from this guy and that's it. There's no further relationship with them.

She told you they were going to try to help him; it didn't work out. He didn't get any help out of all this. Apparently, you may infer, his own drug dealings were so bad for the government went to bat for him about didn't help. Frankly, at the point in time when he was sentenced, not a whole lot had occurred; had it? Other than making the introductions, some meetings and that. That's about all that had occurred at the time.

So Lynn Lowe no longer has this incentive that they're going to argue to you. She came here now as a subpoenaed witness and testified about what happened. She testified that she went to Jamaica. She met with Junji Yamamoto. Her husband took her in December of '88.

Many phone calls after he's locked up, she's calling back and forth to Doug Driver.

And then in 1990, on August the 11th, or sometime right in that time frame, she gets a call from Junji Yamamoto and he says, "I'm sending someone to your house to see Mike."

As Agent Driver told you, during his discussions with Junji Yamamoto earlier on, or I think specifically at their meeting in Jamaica, he told them, Yamamoto told Agent Driver and Mike Lowe, "I'm going to send somebody to your house before I

* * *

EXHIBIT Q

Grand Jury 7-30-91 Augusta, Georgia

[64] me he was in California and wanted me to go to Canada and meet him.

Q. Did you do that?

A. No, no. He called regularly, once again, wanting me to meet him in Canada, Tokyo, Hong Kong, Mexico, Jamaica, Panama, Colombia; says he had work for me, he wanted me to work for him, and at the time I was on probation. There was no way that I could do it, had I wanted to, but I did advise the federal authorities that this is what was taking place in Charleston, West Virginia. They were aware of it.

Q. Well, how was it that you learned you were under – the subject of an investigation at Charleston, West Virginia?

A. Well, you see, I was on probation and upon using the drug and being involved with it, I violated my probation, and I just threw my hands up, and I said, "O.K.," I called my probation people, and I said, "Make arrangements for me to go in and talk with somebody at DEA, you know. I screwed up."

Q. Was it discovered on a urine screen? or did they have some information come –

A. Oh, there was a lot of loose talk. There was no definite information, no. Not told to me, anyway, but there was an ongoing investigation.

Q. Well, at the peak period of your distribution of cocaine in the Southern West Virginia area, in the '85 through '87 period –

[65] A. Uh-huh. [Shakes head affirmatively]

Q. – how much cocaine were you distributing, say, in a month?

A. Oh, maybe two, three ounces. It wasn't anything.

Q. And was all of that cocaine you obtained from people who had been contacted by Jimje Yamamoto?

A. Well, that was never, ever discussed insomuch as that. The only thing was said to me was, Yamamoto said, "You did get what you wanted?" and I said, "Yes," and that was – I mean, he just don't talk about it. He won't talk about it on the phone or anything else. You make the arrangements, you talk to him, and you work it out. Then

that's the end of it, until the next time. He is a devious individual.

Q. After Jimje Yamamoto got out of prison, in I believe '86 or '87, did you ever come to meet with him?

A. Yes, sir, I did.

Q. When was that?

A. I called him in Japan and asked him when the next time was he was coming over to the islands, and he gave me a date which was shortly before Christmas of '88.

Q. O.K., now, at this point in time, Christmas '88, you were already trying to cooperate with the federal authorities, is that right?

A. Yes, for anything they asked me for, yes.

Q. And at this point in time, Christmas '88, had you

* * *

EXHIBIT R

[374] Q When were you and Mr. Lowe married?

A 1989.

Q When was the first time you said you went to Jamaica with him?

A '88.

Q Was your first husband still alive then?

A Yes. He did in – no, he wasn't. He died in February of '88. We went in December of '88.

Q But you had been dating since 1985?

A We were divorced.

Q Ms. Lowe, did you know that Mike Lowe was involved with Mr. Yamamoto at the time you started dating him?

A Not at the time I started dating him; no.

Q What was he – was he involved in drugs at that time?

A Not at that time; no.

Q He was not. Have you ever been involved in drugs?

A No, just my knowledge with Michael.

Q You've never been treated for drugs?

A No.

Q How many children does Mr. Lowe have?

A Two.

Q Where are they today?

A I really don't know.

MR. LLOYD: Your Honor, again I raise a relevancy objection.

* * *

EXHIBIT S

[88] further statement, though, that needs some consideration, and that is the report on page 3 we do not have. It is stated that it was from 1984 to the spring of '87 that a total of 60 ounces of cocaine were brought to Logan, West Virginia by Woosley. As far as we can determine, Lowe was (inaudible) to use cocaine," then they talk about how they have been manipulative, but there is nothing in there about any –

THE COURT: Agreement.

MR. HUBBARD: Nothing about any agreement.

THE COURT: Apparently, though, as part of his deal with the government, they were not to prosecute her; is that right?

MR. HUBBARD: That's the interpretation that we believe is correct, along with her brother Joey Campbell.

MR. LLOYD: Your Honor, may I address a question to Ms. Lowe?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. LLOYD:

Q Ms. Lowe, the lawyer's already asked you some questions. Just tell us what conversations – who did you talk to and what were you told?

A About the agreement?

THE COURT: First of all, yes, whom did you talk to?

[89] A Okay. The same lawyer –

THE COURT: Woman or man?

A Man, Bryant –

THE COURT: Okay. Benjamin Bryant. He is a lawyer. The lawyer representing your husband?

A Right. At that time. Well, he was at that time. Then he went into the – I believe the U.S. attorney's office. He drew up the agreements. I have an agreement that granted me – it pretty much states pretty much the way Mr. Lowe's stated. I did go to Florida and pick the cocaine up and bring it back. We both entered into the agreements, and there was never a charge against me and I was never prosecuted. I do have an agreement signed by Mr. Bryant.

THE COURT: Did Mr. Bryant have that agreement?

A He should have it.

THE COURT: Where did you see him?

A He gave us a copy. I don't even know if –

THE COURT: Did you sign it?

A Yes. I have one. I mean, it's dated the same day.

THE COURT: Where is it?

A I don't even know if I have mine –

THE COURT: You do not have it.

A – if I could even find it.

THE COURT: But apparently Mr. Bryant has it – that is, the lawyer who was then representing Mr. Lowe.

* * *

[102] brother and the government –

A No. No.

THE COURT: – that is what he has asked you.

A No.

Q So he was never charged, he was never investigated by –

A No.

Q – any agency of any nature or description?

A No.

Q Now, you were involved in transporting 60 ounces. That is almost two kilograms of drugs; is that correct?

A I guess.

Q There's 16 ounces in a pound and 2.2 pounds per kilogram; that would almost be two kilograms. Is that right?

A (No audible response)

Q Now, you had previously testified –

MR. HUBBARD: About her name back then.

Q You previously testified under oath when – you were being questioned about drug involvement, and the question was, "What was he, was he involved in drugs at

that time?" Answer: "No, not at that time." And I believe that would be Mr. Lowe. Question: "He was not. Have you been involved in drugs?" Answer: "No, just my knowledge with Mike."

Now, you do not – under that oath when you said you had no information and you were not involved in drugs except your knowledge with Mike and that Mike was doing all

* * *

EXHIBIT T

[358] Q After that trip, did Mike begin working with Agent Driver?

A Yes.

Q And are you familiar with the fact that Mike was doing this in an attempt to help his own sentence that he was facing in West Virginia?

A Yes, sir.

Q And after Mike got sentenced and was incarcerated, did you also assist Agent Driver in this investigation?

A Yes, I did. I continued taking the phone calls from Junji and relaying these calls to Doug Driver.

Q And you also knew at this point that the assistance you were providing to DEA would also be considered as benefit that was being provided by Mike as well?

A Yes, sir. That was the reason for doing it at the time.

Q What is your current relationship with Mike Lowe?

A We are still married but separated. I am filing for divorce.

Q Mike Lowe was sentenced, I believe, on November 21st, 1989. Is that correct?

A That is correct.

Q In 1990, I am going to lead up to the events of August 11th, 1990. During the months before the August events, did you have telephone conversations with Junji Yamamoto, and Mike Lowe was also involved, and with Doug Driver?

A Right.

* * *

EXHIBIT U

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* * *

EXHIBIT V

[808] him, please?

A Yes, sir. Myself and another agent walked down the stairs; went over there; and as he drove up, we advised him that we needed to talk to him. And we walked him upstairs, and we advised him at that time that he was under arrest, that we had an arrest warrant for him from the Southern District of Georgia.

Q Did you show any gun at that time?

A No, sir.

Q You did not point a gun?

A No, sir.

Q Did any other agent point a gun at him?

A No, sir, myself and one other agent went down there the other one was standing at the top of the balcony.

Q Were all of you armed?

A Yes, sir. We were armed.

Q What kind of gun do you carry?

A I carry a Smith and Wesson 9mm.

Q 9mm. Did your appearance on the scene frighten Mr. Castro?

A I don't see why it would have. I showed him by credentials.

Q I mean, were you dressed normally at the time? You weren't' in your drug-dealing outfit? I mean, you had on –

A No, sir. I was in normal casual clothes.

* * *

EXHIBIT W

[776] many agents went with you to Mr. Castro's house?

A Several.

Q How many?

A Several.

Q Several. Is that more than two or –

A Oh, more than two, I know, I recall offhand there were, – there was Agent Ray there.

Q Yes, sir.

A Suzanne Hogan.

Q Uh huh.

A There were three agents, and I don't recall their names from our office, also that were present.

Q Were you armed?

A Yes, sir.

Q I mean, was everybody armed? Were all the agents armed?

A Yes, sir. Yes, sir. We are always armed.

Q Were Mr. Castro when he was actually informed he was under arrest? Was he inside the house; or, was he outside the house?

A He – I think we let him come into his residence.

Q Did anybody point a weapon at him at the time he was arrested?

A There is a possibility that a weapon had been pointed at him; yes, sir.

Q Was it a large caliber weapon. Do you carry large caliber weapons?

* * *

EXHIBIT X

DECLARATION

I, DEBORAH J. POWERS, hereby declare the following:

That I am citizen of the United States of America; that I am an employee of the United States Postal Service, in the City and County of San Francisco; that I am a resident of the City of San Pablo.

That on August 5, 1991, at about 3:30 to 4:00 P.M., I was on my way to visit long time friend Haydee Castro, at her residence at 5 SANTA ANA AVENUE, in the city of Daly city.

That when I approached the intersection of St. Francis Avenue and Clarinda St., of the above named city, I saw my friends husband, HERNAN O. CASTRO, driving up to the same intersection, going in the direction of his home.

That I followed him up to the intersection of Clarinada and Castillejo streets where I stopped at a stop sign and waited for Mr. Castro to park his vehicle.

That I saw Mr. Castro start to make a turn into Santa Ana Avenue, from Castillejo, and proceeded to park my car on Castillejo St., across and little to the west of Mr. Castro's residence. While I was parking, and Mr. Castro was turning into Santa Ana Avenue, two men run towards Mr. Castro vehicle, one with a long hair that came from the front door of Mr. Castro's residence, and the second one that was standing next to the side fence of Mr. Castro's residence rear yard. Both of them had weapons in their hands, and were pointing at Mr. Castro.

That I saw Mr. Castro stop his vehicle, and the long hair individual came whitin a few yards of Mr. Castro's vehicle, where he stop and pointed his gun at Mr. Castro, holding it with both hands. The second individual, stopped behind the first one and also pointed his weapon at Mr. Castro from a standing position.

That both individual were thin, in their early thirties and of about six feet tall.

That Mr. Castro exited his vehicle and was pad searched by the long hair individual, and then lead upstairs to the front door of his residence where he was taken inside, together with the two individuals.

I also noticed standing at the front door of Mr. Castro's residence, a third man, older and heavier than the other two men that ran towards Mr. Castro's vehicle, observing all the events that took place in the street.

That after this events I left in my vehicle, which I never properly parked.

That I called Mrs. Castro, who told me that Mr. Castro had been arrested, as I suspected after witnessing the above described events.

I swear under penalty of perjury that all of the above is a true and correct description of the events that I witnessed on the date and location above named.

/s/ Deborah J. Powers
DEBORAH J. POWERS

SAN FRANCISCO, JULY 24, 1993.

[Jurat Omitted In Printing]

EXHIBIT Z

DECLARATION

I, HERNAN O'RYAN CASTRO, hereby declare, under penalty of perjury, to the following events:

On August 5, 1991, between 3:30 and 4:00 P.M., I was approaching my home, located at 5 SANTA ANA AVENUE, DALY CITY, STATE OF CALIFORNIA, when upon starting to make a "U" turn, at the intersection of SANTA ANA AVENUE AND CASTILLEJO STREET, in the vehicle I was driving, two individuals run towards me, one, that was later identified to me as Savannah's Task Force Officer Irvin Ray, came from the front door of my residence, and the other, an unidentified D.E.A.'s Special Agent, that was standing by the rear fence of my home. Both had weapons drawn and were pointing them at me. I was order to stop the vehicle that I was driving in the middle of the interseccion, and to put my hands where they could be seen by the approaching officers.

Officer Ray came to the door of my vehicle, where he told me to leave the vehicle. He opened the door for me, and told me to go with them to the front door of my residence. I didn't see at what point the weapons were put away, but I don't believe they were visible when we arrived at the living room of my residence.

Terminal Island, State of California, on the 29th day of the month of December of 1993.

/s/ Hernan O'Ryan Castro
HERNAN O'RYAN CASTRO

AUTHORIZED BY THE ACT OF JULY 7, 1955 TO ADMINISTER OATHS (18 U.S.C. 4004)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29 DAY OF DECEMBER 1993 ,
(MONTH AND YEAR)

/s/ [Illegible], Unit Mgr.
SUZAN FELANDO
CORRECTIONAL TREATMENT SPECIALIST

EXHIBIT BB

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
APRIL 4, 1989, GRAND JURY SESSION 88-1
CHARLESTON

UNITED STATES OF AMERICA	Criminal No. 2:89-00056
v.	21 U.S.C. §846 21 U.S.C. §841(a)(1)
MICHAEL LOW, also known as "Jack Kent Crist"	18 U.S.C. §2

INDICTMENT

The Grand Jury Charges:

COUNT ONE

From on or about a date unknown but at least by 1984, until November 16, 1987, in or near Logan and Wyoming Counties, West Virginia and within the Southern District of West Virginia, defendant MICHAEL LOWE, also known as "Jack Kent Crist", did combine, conspire, confederate and agree with others to

knowingly and intentionally possess with intent to distribute cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); in violation of Title 21, United States Code, Section 846.

COUNT TWO

In or about the fall of 1986, at or near Stollings, Logan County, West Virginia, and within the Southern District of West Virginia, defendant MICHAEL LOWE, also known as "Jack Kent Crist", did knowingly and intentionally, unlawfully and without authority, possess with intent to distribute and cause the possession with intent to distribute cocaine, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A True Bill

/s/ Thomas T. [Illegible]
Foreperson

MICHAEL W. CAREY
United States Attorney

By: Nancy C. Hill
Assistant United States Attorney

EXHIBIT CC

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

May 8, 1989 [Address Omitted in Printing]

Mary Lou Newberger
Assistant Federal Public Defender
500 Quarrier Street
Charleston, West Virginia 25301

RE: United States v. Michael Lowe
Criminal No. 2:89-00056 (SD WVa)

Dear Ms. Newberger:

This will confirm our conversations with regard to your client, Michael Lowe (hereinafter "Mr. Lowe"). As a result of these conversations, it is agreed by and between the United States and Mr. Lowe as follows:

1. Mr. Lowe is charged in a two-count indictment as follows:

(a) Count One charges Mr. Lowe with a violation of 21 U.S.C. §846 (conspiring to possess with intent to distribute cocaine).

(b) Count Two charges Mr. Lowe with a violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (unlawful possession with intent to distribute and causing the possession with intent to distribute cocaine).

2. Mr. Lowe will plead guilty to Count Two of said indictment, which charges him with a violation of Title 21,

United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

3. The maximum penalty to which Mr. Lowe will be exposed by virtue of his guilty plea is imprisonment for a period of twenty (20) years and a fine of $250,000, or both, [and a special parole term of at least three (3) years. /s/ MLN] Mr. Lowe will also be subject to a criminal assessment pursuant to Title 18, United States Code, Section 3013. The $50 criminal assessment will be paid in full on the date Mr. Lowe is sentenced.

4. Mr. Lowe will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquiries made of him. Mr. Lowe will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same are deemed necessary. In any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Lowe may have counsel present if he desires.

5. Nothing contained in any statement or testimony given by Mr. Lowe pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by Mr. Lowe. However, nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from that information and testimony being provided by Mr. Lowe pursuant to this agreement. However, this agreement does not prevent Mr. Lowe from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from any such independent,

legitimate source. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Lowe for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of Mr. Lowe failing to be fully forthright and truthful pursuant to paragraph 4 herein.

6. There have been no promises or representations whatsoever made to Mr. Lowe by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Lowe.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Lowe's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate.

8. If either the United States or Mr. Lowe violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

9. Following final disposition, the United States will move the Court to dismiss Count One in Criminal No. 2:89-00056 as to Mr. Lowe.

10. This written agreement constitutes the entire agreement between the United States and Mr. Lowe in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Lowe in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Nancy C. Hill
CHARLES T. MILLER
Assistant United States Attorney

HUNTER P. SMITH, JR.
OCDETF Coordinator

CTM:dch

As evidenced by my signature at the bottom of the four pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Michael Lowe — 8-16-89
MICHAEL LOWE — Date Signed
Defendant

/s/ Mary Lou Newberger — 16 July 1989
MARY LOU NEWBERGER — Date Signed
Counsel for Defendant

EXHIBIT A1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8688

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY LEE TAYLOR,
RANDY WARREN,
HERNANDO TAN DE CASTRO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING

(May 11, 1994)

BEFORE: HATCHETT, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Hernando Tan De Castro, is denied.

ENTERED FOR THE COURT

/s/ Joseph W. Hatchett
United States Circuit
Judge

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR 491-142
	)	
HERNAN O'RYAN CASTRO	)	

GOVERNMENT'S RESPONSE TO DEFENDANT CASTRO'S MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE

Now comes the United States, by and through Harry D. Dixon, Jr., United States Attorney for the Southern District of Georgia, and makes this response to defendant Castro's motion for new trial on grounds of newly discovered evidence, Rule 33, Fed.R.Crim.P.:

Issues

Castro's motion presents four issues:

I. Newly discovered evidence – that being an immunity agreement between Lynn Lowe, a government witness, and the U.S. Attorneys Office for the Southern District of West Virginia;

II. *Brady/Giglio* violation – that being the failure of the government to disclose to Castro prior to trial the Lowe immunity agreement;

III. Alleged perjury by Lynn Lowe – that being her testimony as to her motives for testifying in the Castro trial; and,

IV. Alleged perjury by a government agent – that being the agent's testimony as to a circumstance of Castro's arrest.

Facts

Castro was indicted in the Southern District of Georgia, CR491-142, for his participation in conspiracies to import and to possess with intent to distribute cocaine, 21 U.S.C. §§ 960, 846, together with Junji Yamamoto, Larry Taylor, Randy Warren, and four others. Castro, Taylor, and Warren were tried before a jury from April 6 to 10, 1992, and all were convicted. Yamamoto was a fugitive at the time.

The testimony at trial showed, with particular respect to Castro, that Yamamoto had been in jail with, and had come to trust Mike Lowe, a drug dealer from Rochester, Minnesota. Yamamoto had asked Lowe to find buyers for the large quantities of drugs he had available. Mike Lowe then had the misfortune of getting caught for drug trafficking in West Virginia in 1987. While awaiting disposition of those charges, Mike and Lynn Lowe travelled to Kingston, Jamaica, where Mike met with Yamamoto. Yamamoto agreed to a business arrangement if Mike Lowe could find a capable buyer. Now casting about for a way to improve his outcome in the West Virginia proceedings, Mike Lowe chanced upon a Reader's Digest chronicle of Drug Enforcement Agency Special Agent Doug Driver's success in bringing a member of the Colombia cocaine cartel to justice in Florida. Mike Lowe called Driver, then assigned to the DEA's Denver office, and offered an "in" to a major international player in the drug scene, that being Junji Yamamoto.

Special Agent Driver initiated an undercover operation, and, using Mike Lowe to make introductions and assurances, met Yamamoto in Jamaica on March 31, 1989. Driver offered to make a major cocaine buy from Yamamoto, but Yamamoto demurred, offering instead a cautious preliminary deal of ten to fifteen kilos to be brought into El Paso from Mexico. Driver refused, but codes were set up and negotiations for an importation deal continued. Mike Lowe travelled out of the country at Driver's direction to meet Yamamoto to advance the cocaine deal.

In November of 1989, Mike Lowe began a five-year jail sentence on the West Virginia case. His sudden absence concerned Yamamoto, who began to suspect Mike Lowe may have been working for the police. Negotiations stalled.

In December of 1989, Driver met Yamamoto in Costa Rica. Price and quantity were agreed to for an early 1990 cocaine delivery. With the gross terms agreed, Yamamoto began repeatedly calling to find and speak to Mike Lowe. Mike's wife Lynn took the calls and at Driver's direction attempted to convince Yamamoto that Mike was in the hospital (rather than jail). By August of 1990, Yamamoto had become sufficiently suspicious of Mike's absence to send someone also involved in the deal, his San Francisco representative, to Mike Lowe's residence. That someone was Castro. Though Yamamoto had sent Castro to meet and negotiate the particulars of the Driver importation deal with Mike Lowe at Lowe's home, Lynn Lowe convinced Castro that Mike Lowe was in the hospital and the four hour round-trip drive from the Minneapolis airport to Rochester would be wasted. Lynn Lowe offered instead to meet Castro at the airport and Castro agreed. Castro told Lynn Lowe that he had known Yamamoto for years, and

that Yamamoto had sent him to talk business with Mike Lowe. Castro "convinced" Lynn Lowe that he could be trusted by telling her that he and Yamamoto had served time together, as had Mike Lowe and Yamamoto. Castro told her that if Driver had the money, Castro could supply all the cocaine he needed. Castro said he was returning to San Francisco after the Minnesota meeting, and would travel thence to Panama to meet with Yamamoto. The meeting between Castro and Lynn Lowe at the airport was observed by government agents conducting surveillance for that purpose.

Yamamoto later called wanting a meeting in Mexico with his San Francisco representative, Driver, and the Lowes, and gave Lynn Lowe Castro's telephone and FAX numbers. Driver refused the meeting because of security concerns.

With the deal stalled by the security concerns of both sides, Driver asked Yamamoto if anything could get done. Yamamoto said he was still interested, and confirmed that Lynn Lowe and his San Francisco representative (Castro) had met. In a conversation days later, Yamamoto told Driver that he would send someone other than his San Francisco representative to meet with Driver in Savannah, because he was displeased with Castro's performance at the Minnesota meeting, and would henceforth use other representatives to deal with Driver. In a tape recorded conversation between Mike Lowe and Yamamoto, Yamamoto says Castro is "out of business."

At and immediately following his arrest, Castro made statements amounting to a confession of his knowledge of parts (though not all) of Yamamoto's design to import and distribute cocaine, specifically confirming that he had

travelled to Minneapolis at Yamamoto's direction to meet a female for the purpcse of negotiating a cocaine sale.

Lynn Lowe, then using the name Campbell, had received a letter grant of testimonial immunity from the U.S. Attorney's Office for the Southern District of West Virginia on November 16, 1987. The grant of immunity extended to the government's use of her own statements against her, but not to prosecutions brought on evidence gathered independently of her statements. Her participation as a witness was to extend to "any prosecutions in which she may be involved pursuant to this agreement." The testimonial immunity was a consequence of the plea agreement between Mike Lowe and West Virginia prosecutors.

At the time of Castro's trial, neither the case agents nor the prosecutor in the Southern District of Georgia was aware of the existence of the testimonial immunity grant to Lynn Campbell (later Lowe) in West Virginia. Yamamoto was arrested in Japan and extradited to this district, where he was tried and convicted on March 10-11, 1993. The prosecutor and agents in the Southern District of Georgia were still unaware of the agreement at the start of the Yamamoto trial. On cross-examination during that trial, Lynn Lowe disclosed the existence of her agreement, indicating it to have collateral to her husband's plea agreement.

Issue I

To obtain a new trial based upon newly discovered evidence, movant must satisfy five criteria: (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the

evidence must not be merely cumulative or impeaching; (4) the evidence must be material to the issues before the court; and, (5) the evidence must be of such a nature that a new trial would probably produce a new result. *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988). "The district court should use 'great caution' in granting a new trial motion based on newly discovered evidence." *United States v. Garcia*, 13 F.2d 1464, 1472 (11th Cir. 1994).

Castro fails to show that the evidence is more than merely impeaching or that a new trial would probably produce a new result. The only use of the prior testimonial immunity grant would have been for impeachment. Its effect for such purpose would have been minimal, given that the immunity grant was only testimonial, that it was a consequence of her husband's plea agreement and not her own, and that Lynn Lowe's testimony was copiously corroborated by surveillance, co-conspirator statements, and Castro's own post-arrest statements.

The post-trial discovery of merely impeaching evidence against a witness whose testimony was strongly corroborated by other evidence and duplicated by the defendant's confession fails to establish grounds for new trial.

Issue II

Castro's allegations of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. §2255, but in as much as such a motion may be filed at any time, the government has no objection to Castro's motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. §2255.

The government is required to disclose to criminal defendants evidence which is arguably favorable to them, and this includes impeachment evidence such as testimonial immunity agreements. *United States v Bagley*, 473 U.S. 667, 676 (1985). However, to obtain a new trial, a defendant must satisfy each of four tests: (1) that the government possessed evidence favorable to the defendant; (2) that the defendant neither possessed the evidence nor could have obtained it with reasonable diligence; (3) that the prosecution suppressed the evidence; and, (4) that had the evidence been disclosed, there is a reasonable probability that the outcome of the case would have been different. *United States V. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992).

(1) While the government prosecutors and agents in the Southern District of Georgia did not know or have reason to suspect that Lynn Lowe had in 1987 received testimonial immunity in West Virginia, the standard that applies to the first prong of the *Brady* test is one of constructive possession. *Spagnoulo*, *Id.*; *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989). Despite local prosecutors' actual ignorance of the existence of the evidence, the possession of the evidence by another government prosecutor's office is sufficient to impute possession under *Brady*.

(2) The government does not contest that Castro did not have nor could have obtained the evidence with reasonable diligence.

(3) The good faith, bad faith, moral culpability, willfulness, or best intentions of the prosecutor are irrelevant in determining whether *Brady* evidence has been "suppressed." *United States v. Agurs*, 427 U.S. 97, 110

(1976); *Spagnoulo, Id.* In this light, "suppression" constitutes no more than having or constructively having the evidence and failing to disclose it. In effect, the third prong of the *Brady* test has become but a reprise of the first. Despite the good faith and best intentions of the prosecutor and agents here, the evidence was "suppressed."

(4) Suppression of favorable evidence results in constitutional error justifying new trial "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. The evidence at issue here was not material in that sense, and its disclosure to Castro prior to trial would not have given him a reasonable probability of acquittal. *Spagnoulo*, 960 F.2d at 994. The evidence was merely impeaching, and not strongly so at that. The witness' testimony was otherwise corroborated and was cumulative to Castro's own admissions. The Court of Appeals, on review of Castro's conviction on direct appeal, found the evidence supporting his conviction to be "substantial." *United States v. Taylor*, 17 F.2d 333, 339 (11th Cir. 1994). There is no reasonable doubt that had the evidence of Lynn Lowe's 1987 testimonial immunity grant stemming from her husband's indictment been disclosed to Castro, he would have been convicted all the same.

Because Castro fails the fourth and crucial prong of the *Brady/Giglio* test, he has not met the burden compelling a new trial.

Issue III

Castro alleges that Lynn Lowe committed perjury when she testified that her drug involvement in the past was "just my knowledge with Michael [Lowe]," Castro

Motion for New Trial, p. 19, and that her motive for testifying was to benefit her husband in connection with his West Virginia case. Castro Motion for New Trial, p. 20. Both of these statements are, based on the record in both the Castro and Yamamoto trials, true. Her involvement in the drug trade was in the company of Mike Lowe prior to his arrest, and her involvement later was at the direction of the DEA as a collateral part of her husband's plea agreement. There is a real question as to whether her testimonial immunity agreement compelled her to be a witness in the Castro trial, as it was not one of the prosecutions contemplated thereunder, it having arisen not as a consequence of any of Mike Lowe's drug dealings prior to his West Virginia arrest, but of a "sting" engineered by the DEA with Lowe's assistance. This question need not be resolved however, since Lynn Lowe's answers on direct and cross examination truthfully set out her motivations for testifying, which would have been unimpeached by the disclosure of an agreement designed expressly to benefit her husband's appeal interests.

Issue IV

Castro's allegation of perjury on the part of a government agent is grounded on conflicts between the agent's testimony and that of another government witness regarding whether at the time of Castro's arrest any agent had drawn his weapon. This allegation is patently meritless. Not only is the point at issue immaterial, but the jury heard both witnesses and could assess the credibility of each, assuming that they chose to give any weight whatsoever to the insignificant detail of whether agents arresting Castro, long after any event significant to his participation in the conspiracy, had drawn their weapons.

Conclusion

Whether his motion is considered under Rule 33, Fed.R.Crim.P. or treated as though filed pursuant to 28 U.S.C. §2255, on no ground asserted does Castro meet the burden necessary to justify the grant of a new trial. His motion should be denied.

Respectfully submitted,

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IN PRO SE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA, Plaintiff, v HERNAN O'RYAN CASTRO, Defendant.	:	Case No. CR491-142

REPLY TO GOVERNMENT'S RESPONSE TO CASTRO'S MOTION FOR NEW TRIAL PURSUANT TO F.R.Crim.P., RULE 33

Comes now Defendant, HERNAN O'RYAN CASTRO, In Pro Se, and brings this reply to the Government's response to his motion for new trial pursuant Federal Rules of Criminal Procedure, Rule 33, and shows as follows:

Facts

The facts in this case are as presented in Castro's brief in support of his motion for new trial.

Argument

(1) Appropriateness of Castro's motion for new trial

In its response, the government argues that allegations of a *Brady/Giglio* violation are more properly cognizant under a motion pursuant to 28 U.S.C. 2255. Government's response at 7.

Generally, a motion for new trial may be distinguished from a motion to vacate or set aside judgment, which ordinarily can be had only because of circumstances rendering the judgment inequitable. A motion to set aside must be predicated upon some nonamendable defect which appears on the face of the record or pleadings, or upon lack of jurisdiction; where a motion is based upon some extrinsic defect which does not appear on the face of the record or pleadings, the proper means of attack is a motion for a new trial. See American Jurisprudence, Volume 58, New trial, section 7.

It is obvious that Castro filed the proper motion, since the record does not reflect his allegations of *Brady/Giglio* violations.

(2) The withholding of impeaching evidence

In its response to Castro's motion for new trial, the government avoids all together the subject of the non-disclosure of Lynn Lowe's drug trafficking activities.

> "The thrust of *Giglio* and its prodegy has been to ensure that the jury knows the facts that *might* motivate a witness in giving testimony[.]" *Brown v. Wainwright,* 785 F.2d 1457, 1465 (11th Cir. 1986)

Lynn Lowe, as depicted in the government's response, entered into her immunity agreement as "a consequence of the plea agreement between Mike Lowe and West Virginia prosecutors." Government's response at 5.

This is not reflected by the facts. Lynn Lowe and her brother Joey Campbell transported approximately 60 ounces of cocaine (not an insignificant amount) from Florida to Logan County, West Virginia. She entered into the immunity agreement because of that criminal act, and in order to save herself and her brother from being indicted with Michael Lowe.

The government not only failed to disclose the existence of the immunity agreement, but it also failed to disclose the reason for Lynn Lowe to enter into that agreement; her involvement in drug trafficking.

While in its response to Castro's motion for new trial the government concedes that the knowledge of the existence of the immunity agreement can be imputed to the prosecuting team, they are silent with respect to Lynn Lowe's drug trafficking activities. That silence is unimportant. The same reasons that support the imputation of knowledge of the immunity agreement to Castro's prosecuting team, also supports their knowledge of Lynn Lowe's drug trafficking activities. Of course the knowledge of the existence of Lynn Lowe's immunity agreement would make it as good as if Castro's prosecutor had the immunity agreement and the evidence of Lynn Lowe's drug trafficking activities in his file. In its response to Castro's motion the government concedes as much.

The government further concedes that Castro did not have or could have obtained the immunity agreement. No concessions are made with regard to the evidence of Lynn

Lowe's drug trafficking activities, but, as argumented by Castro in his brief in support of his motion for new trial, without the disclosure by the government of this evidence, there was no reason for Castro to suspect that Lynn Lowe had been involved in drug trafficking. She denied as much in front of the Grand Jury; prior to Castro's trial the government informed Castro that they had no materials with regard to Lynn Lowe, in response to Castro's motion for discovery; and Lynn Lowe was asked at Castro's trial about her involvement in drug trafficking, and she answered that she had none. With any amount of reasonable diligence, Castro would have been unable to discover Lynn Lowe's drug trafficking activities.

The government also concedes that they suppressed the immunity agreement. Again, no concessions are made about Lynn Lowe's drug trafficking activities, but, as the government so candidly puts it, this "third prong of the *Brady* test has become but a reprise of the first." Government's response at 8. Therefore, if the government possessed the evidence and Castro never got it, it follows that the government suppressed it[1].

As it respects to the final prong to succeed in obtaining a new trial due to a *Brady* violation, the government claims that the evidence of the immunity agreement was

[1] Even though the good faith or bad faith of the prosecutor is irrelevant in determining whether a *Brady* violation exists, it is important to bring to this Court's attention the fact that as of today, almost a year and a half since Yamamoto's trial, where the existence of the immunity agreement and of Lynn Lowe's drug trafficking activities came to light, the government has made no effort to notify Castro of these obvious *Brady* violations. If it wasn't because of Yamamoto's trial attorneys, Castro would still be in the dark about these violations.

"merely impeaching, and not strongly so at that." Government's response at 8.

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Giglio v United States,* 405 U.S. 150, 154 (1972)

The government claims that Lynn Lowe's testimony was otherwise corroborated and was cumulative to Castro's own admissions. Government's response at 8-9. Castro's trial defense theory was two fold, as presented by Castro's counsel to the jury at closing argument and through jury instructions.

Castro's first defense was that he never entered into an agreement to import and distribute cocaine, as charged by the Grand Jury. In this respect, the testimony of Lynn Lowe was central to the government's case. The only corroborating evidence is that from Castro's alleged admissions after his arrest. But, in the government's own words, Castro stated that "he travelled to Minneapolis at Yamamoto's direction to meet a female for the purpose of *negotiating* a cocaine sale." Government's response at 5. The government forgets what the Ninth Circuit taught us in *United States v. Melchor-Lopez,* 627 F.2d 886 (9th Cir. 1980), by stating "[h]ere the government proved that each appellant engaged in [negotiations] which might have ended in firm commitments but failed to establish the "meeting of the minds" to consummate an illegal transaction which is essential to conspiracy." Id. at 892. Keeping in mind that Yamamoto was a broker of drugs, as the trial evidence proved, and not a supplier, the fact that Castro allegedly went to Minnesota to negotiate a drug deal at Yamamoto's direction, is not probative of an agreement

between Yamamoto and Castro to commit the offenses charged by the Grand Jury. An agreement to negotiate an agreement is not an agreement to commit a crime as required by conspiracy law. Castro's conviction was based on Lynn Lowe's trial testimony. She gave the jury what they considered sufficient evidence to convict Castro. The rest of the evidence was not probative of the existence of the criminal agreement. Therefore, for Castro's first theory of defense Lynn Lowe's testimony was central.

Castro's second theory of defense was that even if he entered into an agreement with Yamamoto to import and distribute cocaine, this agreement was not the indicted agreement, although its goals were identical, therefore Castro claimed that there was a variance between the indictment and the evidence presented by the government at trial.

For this defense theory, Lynn Lowe provided the only evidence that the jury could have considered in reaching their verdict. Lynn Lowe testified as to Castro's knowledge of Yamamoto's prior negotiations with Mike Lowe; she also testified as to Castro's close relation with Yamamoto, and about Carlos Chang knowing Castro. She also testified that both Castro and later Chang stated that, each individually, could supply any amount of cocaine that the customer wanted.

Without Lynn Lowe's testimony the jury would have been left with very little from where to inferred the existence of single agreement among all of the defendants[2].

The evidence of Lynn Lowe's drug trafficking activities, as well as the immunity agreement she was forced to enter to keep herself and her brother Joey out of prison, or at least from being indicted together with Mike Lowe, would have been the *only* impeaching evidence that Castro would have possessed to undermine the credibility of the witness. As it was, Lynn Lowe's testimony went unchallenged, as if she had never been cross examined by the defense.

Furthermore, the immunity agreement was the reason for Lynn Lowe to testify.

As the Second Circuit said,

> "[A] witness's credibility could very well [be] a factor of central importance to the jury, indeed every bit as important as the factual elements of the criminal case." *United States v. Wallach,* 935 F.2d 445, 455 (2nd Cir. 1991)

(3) The perjured testimony

(a) By Lynn Lowe

In its response to Castro's motion for new trial, the government claims that both, Lynn Lowe's answer to

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[2] It is also important to note that it was Lynn Lowe's testimony that the government, the Probation Officer and this Court relied upon to find Castro responsible for the sixteen kilograms of cocaine distributed by Chang.

defense counsel with regard to her drug involvement and to the prosecutor about her reasons for testifying, were true. Government's response at 9.

The government argues that Lynn Lowe answered truthfully to the question about her involvement with drugs because when she said that all she had was "just [her] knowledge with Michael [Lowe]," she was actually stating that "[h]er involvement in drug trade was in the company of Mike Lowe." Government response at 9. Either the government has a distorted sense of what is true and what is not, or the government has no other response to Castro's allegations. Lynn Lowe deliberately lied to the Court and the jury in order to hide her involvement in drug trafficking, correctly fearing that if she told them about her drug trafficking activities the jury was going to look more closely at her testimony. The question that Castro's counsel asked her was very specific. Her answer was deliberately untruthful.

On the other hand, with respect to the second claim of perjury brought by Castro, in response to the prosecutor's question with regard to her motives for testifying at Castro's trial, Lynn Lowe responded that there was no present motive to compel her to testify. The government argues that the prosecutions in Savannah had no relation to the case in West Virginia, because the Savannah case had been "a sting engineered by DEA with Lowe's assistance." Government's response at 10. However, this is not factual. After the FBI rejected the story that Mike Lowe told them, he went to the DEA with the *same* story; at DEA he found interested ears in Driver. Lowe's story didn't change; Yamamoto, who had played an important role in the supply side of the drugs that resulted in Mike Lowe's investigation and indictment in West Virginia, was

a "worldwide broker of cocaine" and Lowe could purchase large quantities of cocaine through him. This was the story to the FBI in West Virginia; this was the story to Driver in Denver and later in Savannah. The purpose of Lynn Lowe's immunity agreement was for her to participate in the investigations related to the West Virginia case, either in that state or elsewhere, and to testify in the cases coming from those investigations, in exchange for her immunity from prosecution in the West Virginia case. Yamamoto was related to the case in West Virginia, therefore his investigation was covered by Lynn Lowe's immunity agreement. The government alleges that Castro was part of the Yamamoto organization. This would make Castro also a target for Lynn Lowe's immunity agreement, both for investigation and for prosecution. Lynn Lowe testified at Castro's trial pursuant to her immunity agreement.

The government has conceded that the possession of the withheld immunity agreement can be imputed to Castro's prosecuting team and the situation as to Lynn Lowe's drug trafficking activities falls in a similar situation as the immunity agreement, therefore the possession of the evidence of her drug trafficking activities can also be imputed to Castro's prosecuting team. Hence, the knowledge of her immunity agreement and of her drug trafficking activities are imputable to the prosecuting team.

> "The prosecutor presenting the government's case need not be aware that testimony is false in order for due process violation to occur; it is sufficient if *another government attorney* knows about the false testimony and no steps are taken to correct it." *Mills v Scully,* 826 F.2d 1192, 1195 (2nd Cir. 1987)

Lynn Lowe answered untruthfully, the government had knowledge of her untruthfulness and did not attempt to correct the falsity.

> "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice' . . . [t]he same result obtains when the [government], although not soliciting false evidence, allows it to go uncorrected when it appears. . . . This rationale extends to impeaching evidence." *DeMarco v United States,* 928 F.2d 1074, 1076 (11th Cir. 1991)

Furthermore, the government received a rainfall from Lynn Lowe's perjured testimony when the prosecutor argued to the jury in closing argument that Lynn Lowe had come to testify as a subpoenaed witness, and that the only pressure that had existed for her to cooperate with the government during the investigation of the case, that is, to help her incarcerated husband, was no longer a factor since she was filing for divorce from him. In this way the prosecutor boosted the credibility of Lynn Lowe in the eyes of the jury, using her perjured testimony, testimony known to government to be perjured.

> "The government has a duty not to exploit false testimony by a prosecutorial argument affirmatively arguing to the jury the truth of what it knows to be false." *Brown v Wainwright,* 785 F.2d 1457, 1464 (11th Cir. 1986)

Lynn Lowe committed perjury at Castro's trial[3] with the prosecutor's knowledge, who failed to correct the falsity and later argued to the jury what he knew to be false.

As to the materiality of Lynn Lowe's perjury, as stated before, Lynn Lowe's testimony was central, if not the sole support (as to his multiple conspiracy defense theory) to Castro's convictions. Her testimony of the conversation with Castro was uncorroborated as to its content. The best the government had from other sources is that Castro had some connection with Yamamoto, as far as his drug trafficking activities, that Castro had the availability to supply drugs to Driver (or at least a sample), and that Castro had gone to Minneapolis at Yamamoto's request to

[3] It is of relevant importance to mention at this point that as far as Castro knows, Lynn Lowe has given sworn testimony three times in relation to the case at bar. On her first appearance she gave false testimony to the Grand Jury with regards to her drug trafficking activities (at best she consciously mislead the Grand Jury); see Grand Jury transcripts for July 31, 1991, at page 54. On her second sworn testimony she appeared at Castors' trial and again committed perjury. In this regard it must be noted that Castro objected to the P.S.I.'s report description of the events that Lynn Lowe testified to, as not been factual. The third time that Lynn Lowe testified she did it at defendant Yamamoto's trial. Among other instances of perjury, she stated at the March 1993 trial that she had obtained a divorced from her then deceased former husband, Michael Lowe, in May of 1992. Castro has obtained information that Lynn Lowe never obtained a divorce from Michael Lowe. See attached Exhibit 1, from Lynn Lowe's direct examination at Yamamoto's trial; Exhibit 2, a complaint for divorce filed by Irian Lynn Lowe against Michael Lowe at the Kanawha County Circuit Court, in West Virginia, Civil Action No. 92-C-1792, and Exhibit 3, a copy of the docket for the same case as of September 17, 1993. Castro ignores the reason(s) for Lynn Lowe to lie about something of so little importance. But somebody that lies in something so intranscendental can be expected to lie in more important matters.

attempt to negotiate a drug sale to Lynn Lowe, who met him at the Minneapolis/St. Paul airport. Lynn Lowe's testimony provided what the jury considered to be sufficient to convict Castro in the two conspiracy counts. She gave the only evidence the jury could have used to reach the decision that if an agreement existed between Castro and Yamamoto, that was the same agreement that had been indicated under the conspiracy counts.

If the government had stepped forward at the time, and informed the jury that Lynn Lowe had committed perjury, her credibility would have been severely damaged.

> "A jury may very well give great weight to a precise reason to doubt credibility when a witness has been shown to be the kind of person who might perjure [her]self." *United States v Sanfilippo,* 564 F.2d 176, 178 (5th Cir. 1977)

(b) By Irvin Ray

In its response, the government states that this allegation of perjury is "grounded on conflicts between the agent's testimony and that of another government witness," government's response at 10. And that the issue is immaterial because the conflict of the testimonies was heard by the jury and the jury "could asses the credibility of each, assuming that they chose to give any weight whatsoever to the insignificant detail of whether agents arresting Castro, long after any event significant to his participation in the conspiracy, had drawn their weapons." Government's response at 10.

First of all, Castro is not basing this claim of perjury in contradicting trial testimony of the two arresting

officers that testified at Castro's trial. While Irvin Ray testified that he had not drawn his weapon during Castro's arrest, and that nobody else had, Paul Boulad testified that "there is a possibility that a weapon had been pointed at [Castro]; yes, sir."

Castro is saying that both officers lied. Agent Boulad mislead the jury by saying that there was a "possibility" that a weapon had been pointed at Castro, when he in fact had a direct view of Castro's arrest from his position at the top of the balcony of Castro's home, overviewing the area where Castro was arrested, and no more than thirty feet away[4].

It is of no importance what the subject of the perjury was, as claimed by the government. What is material is the fact that agent Ray, *the case agent,* committed perjury. And that also agent Boulad committed perjury, or at a minimum, mislead the jury and this Court, which has the same result.

> "[I]t is not the [subject of the perjury] but the alleged [perjury itself] that would make [the] evidence material[.]" *United States v White,* 972 F.2d 16, 20 (2nd Cir. 1992)

Of course, the prosecutor had no idea of the perjury, and Castro has not claimed otherwise. But,

> "It is indeed true that the police authorities are part of the prosecution; perjured testimony by

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[4] Castro's fifteen year old son was standing at the balcony next to agent Boulad during Castro's arrest. He saw both, the weapons pointing at Castro and agent Boulad observing the arrest.

> the police raises due process concerns whether or not the perjury is known to the prosecuting attorney." *United States v Snoody,* 862 F.2d 1154, 1156 (5th Cir. 1989)

Agents Ray and Boulad's testimony, by itself, was not central to Castro's conviction, but they presented what the prosecution called, among others, "Castro's confessions" about the purpose of his trip to Minneapolis. This was what the prosecution needed to corroborate, in part, Lynn Lowe's testimony, and give her the credibility that the government needed for the jury to believe her, and therefore convict Castro. And it worked. In this sense, Ray and Boulad's testimony was essential to Lynn Lowe's credibility.

If the jury would have known that both of these witnesses were committing perjury, their testimony would have been worthless, and Lynn Lowe's testimony, even without her own perjury, would have been largely uncorroborated, and there is a reasonable likelihood that the jury would have had enough doubts to reach a different result.

Conclusion

Castro's trial was tainted by the government's withholding of crucial impeaching evidence and by the perjury of the government witnesses that presented otherwise uncorroborated evidence about Castro's statements. This statements, both to Lynn Lowe and to the arresting officers were the sole support of Castro's convictions. An attack on the credibility of each of those witnesses could have resulted in a different result in Castro's trial. Castro

has presented to this Court compelling evidence of both, the suppression of material evidence by the government, and of the government's knowing use of prejured testimony. There is no other mean to remove the taint from Castro's trial than for this Court to order a new trial, or to dismiss Castro's indictment for government misconduct.

Respectfully submitted,

Date: September 4, 1994

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In Pro Se

EXHIBITS

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EXHIBIT 2 – FROM LOWE v LOWE – COMPLAINT 3-6

EXHIBIT 3 – FROM LOWE v LOWE – DOCKET 7

EXHIBIT 1

[19] you.

THE COURT: All right. Any objection to the exhibit?

MR. HUBBARD: I'm sorry.

THE COURT: Any objection to the exhibit?

MR. LLOYD: We would tender Government Exhibit 2.

MR. HUBBARD: The exhibit being tendered, it's my understanding that this came from Agent Ray. There's been no connection in the chain of custody.

MR. LLOYD: That's fine. I'm going to have Agent Ray testify.

THE COURT: All right. You may stand down.

(WITNESS WITHDREW FROM THE STAND)

THE COURT: Call your next witness.

MR. LLOYD: Call Lynn Lowe.

CLERK: Please state your full name, spell your last.

MS. LOWE: Lynn Lowe, L-o-w-e.

LYNN LOWE was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LLOYD:

Q Ms. Lowe, were you formerly married to Mike Lowe?

A Yes, I was.

Q I want to take you in time now to approximately 1987-[20]1988 time frame. Did your husband Mike Lowe get into some trouble with the authorities in West Virginia?

A Yes. He was indicted for cocaine possession with intent.

Q All right. At some point did you become familiar with him contacting Agent Doug Driver of the DEA in Denver?

A Yes.

Q And were you involved in discussions and do you know why he got in contact with Agent Driver?

A Well, he read about Agent Driver in the *Reader's Digest*, and called him and told him, you know, what he could do in the hopes that he would get a lighter sentence from the Court in the Southern District.

Q Where is Mike Lowe today?

A He's deceased.

Q Prior to his death, what was your marital status with him?

A Divorced.

Q Approximately when did you obtain the divorce?

A May, '92.

Q And approximately when did he die?

A December, '92.

Q Did you take any trips with Mike Lowe when he was your husband to Jamaica?

A No. We weren't married.

* * *

EXHIBIT 2

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

IRIAN LYNN LOWE

Plaintiff,

vs. CIVIL ACTION NO. 92-C-1792

MICHAEL GEORGE LOWE

Defendant.

COMPLAINT

Your Plaintiff, Irian Lynn Lowe, respectfully represents unto Your Honor as follows:

I

That the Plaintiff and the Defendant were legally and lawfully married on the 9th day of November, 1989, in

Catlettsburg, Kentucky, as will more fully and at large appear from the marriage records thereof

II

That the Plaintiff if a legal and bona fide resident and citizen of the State of West Virginia.

III

That the Defendant is a legal and bona fide resident and citizen of the State of Kentucky.

IV

That the Plaintiff and the Defendant last lived and cohabited together as husband and wife in Logan, Logan County, West Virginia, on or about the 21st day of November, 1989.

V

That neither the Plaintiff nor the Defendant is a member of the Armed Forces of the United States of America nor any of its allies.

VI

That the Defendant has been an incarcerated convict since the 21st day of November, 1989, and was sentenced to five (5) years and is currently in an Federal prison in Ashland, Kentucky.

VII

That no children were born of the marriage between the Plaintiff and the Defendant and the Plaintiff is not pregnant.

VIII

That all during her marriage to the Defendant, the Plaintiff has fully met and performed all the obligations required by the marriage relationship and has done all things to make the Defendant happy and to make their marriage a success.

IX

That irreconcilable differences have arisen between the Plaintiff and the Defendant within the meaning of Chapter 48, Article 2, Section 4, Subsection (a)(10) of the West Virginia Code of 1931, as amended.

X

That the Defendant subsequent to the marriage had, been convicted of the commission of a crime which is a felony, and such conviction has been final, within the meaning of Chapter 48, Article 2, Section 4, Subsection (a)(2) of the West Virginia Code of 1931, as amended.

XI

That the parties hereto will have by the time this matter can be heard will have lived separate and apart in separate places of abode without any cohabitation and without interruption for at least one (1) year within the

meaning of Chapter 48, Article 2, Section 4, Subsection (a)(7) of the West Virginia Code of 1931, as amended.

WHEREFORE, the Plaintiff, Irian Lynn Lowe, respectfully prays and demands:

1. That summons be duly issued, directed to the said Defendant;

2. That the Plaintiff be granted a judgment of absolute divorce from the Defendant;

3. That the Plaintiff be restored her former married name of Woolsey; and

4. That the Plaintiff may be granted such other and further relief as the Court may deem to be just and proper.

IRIAN LYNN LOWE

By Counsel

/s/ [Illegible]
J. Stephen Max
Counsel for the Plaintiff
405 Capitol Street, Suite 800
Charleston, West Virginia 25301

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

IRIAN LYNN LOWE, the Plaintiff named in the foregoing and hereto annexed Complaint, after being first duly sworn, upon her oath deposes and says that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information and

belief, and that insofar as they are therein stated to be upon information and belief, she believes them to be true.

/s/ Irian Lynn Lowe
Irian Lynn Lowe

Taken, subscribed, and sworn to before me this 21st day of April, 1992, by IRIAN LYNN LOWE.

My commission expires January 30, 2001.

/s/ [Illegible] D. Thayer

[SEAL] OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
[ILLEGIBLE] D. THAYER
[ILLEGIBLE]
My Commission Expires
January 30, 2001

EXHIBIT 3

Ln.	Date	Action/Results
1.	04/27/92	# ISSUED SUM & 1 CPY; F FEE, MAX FOR P; CK; RCPT 210426; $50.00
2.	04/27/92	# COMPLAINT
3.	06/04/92	$RESP TO C; LTR
4.	09/17/93	$LTR TO CLK FR CASTRO OTED 9/8/93.

C=CHG A=ADD F=FORWARD B=BACK 1-4=SCREEN D=DEL 9=MENU T=TRANS # CMD8=APP ACT S=SELECT

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	**No. CR491-142**
	)	
vs.	)	
HERNAN O'RYAN CASTRO	)	

ORDER AND MEMORANDUM

(Filed Oct. 28, 1994)

Currently before the Court is defendant Castro's motion for new trial pursuant to Federal rule of Criminal Procedure 33 filed July 11, 1994. The government's response was filed August 22, 1994, the defendant's reply was filed September 12, 1994. for the reasons set forth below, defendant's motion for a new trail is **DENIED**.

BACKGROUND

The grand jury indicted defendant Castro, along with several others, on September 3, 1991, for conspiracy to possess with intent to distribute cocaine and for conspiracy to import cocaine into the United States. A jury trial was held in the case from April 6, 1992, until April 10, 1992. Castro and two co-defendants tried with him were found guilty. Castro was sentenced on July 14, 1992, to 240 months on Counts 1 and 2 to be served concurrently. Castro appealed both his conviction and his sentence. These were affirmed by the Eleventh

Circuit Court of Appeals on March 24, 1994. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994). Castro's petition for rehearing was denied by the Court of Appeals on May 11, 1994. Castro's petition for certiorari to the United States Supreme Court was denied on October 17, 1994. (No. 94-5623). The mandate was issued by the Court of Appeals on August 22, 1994.

The relevant facts are as follows. The defendant was a San Francisco drug trafficking representative for Junji Yamamoto, a Japanese national who was deported after serving time for drug trafficking. Yamamoto met Mike Lowe while they were incarcerated together. After his release from prison, Lowe was arrested again in 1987 for drug trafficking.

In order to benefit himself in the latest proceedings against him, Mike Lowe called Special Agent Doug Driver of the federal Drug Enforcement Agency and offered a connection to Yamamoto. In March, 1989, Lowe introduced Driver, who was posing as a businessman interested in purchasing large quantities of cocaine, to Yamamoto. Lowe was incarcerated on the drug trafficking charges in November, 1989. When Yamamoto began calling Lowe, his wife Lynn, at the direction of Driver, told him that her husband was hospitalized. In August, 1990, Yamamoto became suspicious and sent Castro to meet with Mike Lowe. Lynn Lowe met Castro at the airport and convinced him that a four hour round trip to the hospital would be a waste of time. Instead, Lowe and Castro talked at the airport. Castro was arrested at his home in California on August 5, 1991.

As part of Mike Lowe's plea agreement on the 1987 charges, Lynn Lowe was given a letter grant of testimonial immunity from the U.S. Attorney's office for the Southern District of West Virginia on November 16, 1987. Her grant of immunity extended to the government's use of her own testimony against her in any prosecutions in which she was involved in pursuant to the agreement. The government has asserted, and Castro has not disputed, that neither the prosecutor nor the case agents were aware of the immunity agreement at or during Castro's trial. The government became aware of the agreement in March, 1993, in Yamamoto's trial when the agreement was disclosed during Lynn Lowe's cross examination.

DISCUSSION

In his motion for new trial, defendant raises three grounds which he contends that he is entitled to a new trial based on newly discovered evidence. He asserts that the government failed to disclose exculpatory evidence in violation of *Brady* because of its failure to disclose Lynn Lowe's immunity agreement and her prior involvement in drug trafficking activities. Defendant further asserts that perjured testimony was allowed at his trial when Lowe testified that she had not been involved with drugs except for her knowledge with Michael Lowe. Defendant contends that Irvin Ray, Task Force Officer assigned to the Drug Enforcement Administration, committed perjury at trial when he testified that no weapons were drawn during Castro's arrest. In the government's response, the government asserts that is has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33

and 28 U.S.C. §2255. Accordingly, the Court will consider defendant's motion as requesting both kinds of relief.

The general standard for granting a new trial on the basis of newly discovered evidence is:

> (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Bollinger, 796 F.2d 1394, 1401 (11th Cir. 1986) (citation omitted), *cert. denied*, 486 U.S. 1009 (1988). At a minimum, all of the defendant's newly discovered evidence fails to meet the third requirement of this standard. The immunity agreement, evidence of drug trafficking, and alleged perjured statements are made impeaching evidence. There are specific standards for *Brady* violations and for false testimony, however. Defendant's evidence will be examined using these standards as well.

A. Failure to Disclose Immunity Agreement

Petitioner contends that Lynn Lowe's immunity agreement and drug trafficking activities were wrongly suppressed by the government since they constituted exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). In order to make out a *Brady* violation, petitioner must show that:

> (1) that the government possessed evidence favorable to the defendant (including impeachment evidence;) (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) (quoting *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989)). In the present case, the government concedes that the first three prongs of the test have been satisfied. The government argues, however, that the fourth prong has not been satisfied.

In order to meet the fourth requirement, defendant must show that there is a "reasonable probability" that the outcome of the trial would have been different. "A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome' of the trial." *United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2723 (1994). In the present case, it cannot be said that if the immunity agreement had been disclosed to the defendant, the outcome of the trial would have been different.

Any impeaching effect from the immunity agreement would have been minimal. Agent Driver corroborated Lowe's testimony by affirming the meeting between Lowe and Castro. Agent Boulad and Agent Ray both testified that after his arrest, Castro admitted to

meeting with a female in Minneapolis to negotiate a cocaine deal. Furthermore, Yamamoto's phone number was given to the agents by Castro at the time of his arrest. Lowe's testimony was therefore corroborated by other evidence. Accordingly, there is not a reasonable probability that the outcome of the trial would have been different and defendant is not entitled to a new trial based on this evidence.

In his reply brief, defendant Castro argues that not only did the government fail to disclose Lowe's immunity agreement but they also failed to disclose her drug trafficking activities involving transportation of drugs from Florida to West Virginia. The same analysis applied to the immunity agreement applies with equal force to any drug trafficking activity. It is merely minimal impeaching evidence and does not demonstrate a reasonable probability that the outcome of the trial would have been different.

B. Perjured testimony of Lynn Lowe

Defendant argues that Lynn Lowe committed perjury when she testified at his trial that her prior drug involvement was just her "knowledge" with her husband, Michael Lowe. Defendant asserts that because it came out at Yamamoto's trial in 1993 that Lowe had transported drugs from Florida to West Virginia, Lowe perjured herself at his trial in 1992.

If a defendant can show that the government's case included false testimony that the government knew or should have known of, a new trial must be held if there is a reasonable likelihood that the false testimony

affected the judgment of the jury. *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).[1]

The government argues, and the Court agrees, Lynn Lowe did not testify falsely when she testified that her prior drug activities involved just her "knowledge" with Michael Lowe. At Yamamoto's trial, she was confronted by this previous testimony on cross-examination by Yamamoto's attorney. Lowe testified that she was not asked about the transportation of drugs in the 1992 trial. In any event, it appears undisputed that the transportation of drugs involved her husband Michael Lowe. Therefore, her testimony at defendant's trial was not false.

Even if Lowe's testimony was false, however, there is not a reasonable likelihood that the false testimony affected the judgment of the jury. The testimony could only have been used to impeach Lynn Lowe. As noted above, her testimony was corroborated by other testimony and by the statement of defendant Castro. Therefore, defendant is not entitled to a new trial based on the alleged perjury by Lynn Lowe.

C. Perjured Testimony of Irvin Ray

Defendant contends that Task Force Officer Irvin Ray committed perjury when he testified that no one pointed a gun at Castro during his arrest. Defendant

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[1] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered before October 1, 1981.

contends that based on newly discovered evidence, the affidavit of Deborah J. Powers testifying that she saw guns drawn during the arrest, he is entitled to a new trial based on Ray's perjured testimony.

The evidence of Ray's alleged perjury is not newly discovered evidence for purposes of Rule 33. Presumably, defendant Castro knew at his trial whether guns were drawn during his arrest. His "newly discovered evidence" is merely that of a witness who could have been produced at trial. Furthermore, for purposes of 28 U.S.C. §2255, there is no evidence, newly discovered or otherwise, that Ray committed perjury. The affidavit only shows that another person could have testified to the contrary.

Finally, the Court finds that even if the motion were based on newly discovered evidence and even if the testimony was perjured, there is not a reasonable probability that the false testimony affected the judgment of the jury. It is immaterial whether weapons were drawn during Castro's arrest. The alleged false testimony may have had a very slight impeaching effect on Ray's testimony. It would have had no effect at all on the judgment of the jury in this case.

Accordingly,

IT IS HEREBY ORDERED that defendant Castro's motion for new trial be and is **DENIED**.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

Dated:

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA) CASE NO. CR491-142
)
VS)
)
CASTRO)

The undersigned, a regularly appointed and qualified deputy in the office of the Clerk of this district, while conducting the business of the court for said division, does hereby certify the following particulars:

1. Pursuant to instructions from the Court, and in the performance of my official duties, I personally placed in the United States Mail a sealed envelope bearing the lawful frank of the Court, and properly addressed to each of the persons, parties or attorneys named below; and

2. That the aforementioned envelopes contained a copy of the document known as Order & Memo dated 10/28/94, which is part of the official records of this case.

Date of Mailing: 10/28/94
Date of Certificate: 10/28/94

HENRY R. CRUMLEY, JR.,
CLERK

By: /s/ Michael [Illegible]
Deputy Clerk

CERT	Name	Address
_____	1. Hernan O'Ryan Castro, 73026-011, FCI Terminal	
_____	2. Island, P.O. Box 3007, San Diego, CA 90731-0207	
_____	3.	

_____ _____

_____ 4. _____

_____ 5. _____

_____ 6. _____

_____ 7. _____

_____ 8. _____

CERT	COPY	
_____	1	DISTRICT JUDGE
_____	_____	MAGISTRATE JUDGE
_____	_____	U.S. COURT OF APPEALS
_____	1	MINUTES
_____	_____	TICKLER
_____	_____	U.S. PROBATION
_____	_____	U.S. MARSHALS
_____	1	U.S. ATTORNEY
_____	_____	NICOLE
_____	_____	RAY

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9270
Non-Argument Calendar

D. C. Docket No. CR491-142

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERNAN O'RYAN CASTRO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(March 19, 1996)

Before DUBINA and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

This is an appeal from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33. We affirm for the reasons set forth in the Order and Memorandum of the district court filed October 28, 1994. We also find no error in the denial of an evidentiary hearing.

Affirmed.

CV497-97

FORM FOR MOTIONS UNDER
28 U.S.C. SECTION 2255

Name HERNAN O'RYAN CASTRO

Prison Number 73026-011

Place of Confinement F.C.I. TERMINAL ISLAND, SAN PEDRO, CALIFORNIA

United States District Court SOUTHERN District of GEORGIA

Case No. _____ (to be supplied by Clerk of U.S. District Court)

United States,

v.

HERNAN O'RYAN CASTRO
(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need

be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is, Post Office Box 8286, Savannah, Georgia 31412.

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S.D.C. FOR THE SOUTHERN DISTRICT OF GEORGIA

2. Date of judgment of conviction JULY 14, 1992

3. Length of sentence 240 MONTHS OF IMPRISONMENT/ 10 YEARS S/R

4. Nature of offense involved (all counts) COUNT 1: CONSPIRACY TO POSS. W/INTENT TO DIST. MULTIKIGRAMS OF COCAINE, IN VIOLATION OF 21 USC §§ 841(a)(1) & 846, AND 18 USC § 2; COUNT 2: CONSPIRACY TO IMPORT MULTI-KILOGRAMS OF COCAINE, IN VIOLATION OF 21 USC §§ 960(a)(1) & 963, AND 18 USC § 2

5. What was your plea? (Check one)

   (a) Not guilty (X)
   (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____
   _____

6. Kind of trial: (Check One)

   (a) Jury (X)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (X)

8. Did you appeal from the judgment of conviction?
   Yes (X) No. ( )

9. If you did appeal, answer the following:

   (a) Name of court USCA FOR THE 11TH CIRCUIT

   (b) Result CONVICTION AND SENTENCE AFFIRMED

   (c) Date of result MARCH 24, 1994

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions applications or motions with respect to this judgment in any federal court?
    Yes (X) No ( )

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court U.S.D.C. SOUTHERN DISTRICT OF GA.

   (2) Nature of proceeding MOTION PURSUANT F.R.Cr.P., RULE 33

   (3) Grounds raised VIOLATION OF BRADY AND GIGLIO DOCTRINES

   (4) Did you receive an evidentiary hearing on your petition, application or motion?

   Yes ( ) No (X)

   (5) Result MOTION DENIED

   (6) Date of result OCTOBER 29, 1994

(b) As to any second petition, application or motion give the same information:

   (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First Petition, etc. Yes (X) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may

attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. *However, you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for *relief*, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an constitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing case or law): COUNSEL DID NOT MOVE TO SUPPRESS MOVANT'S POST-ARREST STATEMENTS WHICH WERE MADE IN VIOLATION OF MOVANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

B. Ground two: MOVANT WAS RENDEREED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing cases or law): COUNSEL DID NOT MOVE TO SUPPRESS MOVANT'S POST-ARREST STATEMENTS BASED ON THEIR INVOLUNTARINESS

C. Ground three: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing cases or law): COUNSEL DID NOT OBJECT TO THE INTRODUCTION OF PREJUDICIAL CO-CONSPIRATOR'S STATEMENTS

MADE AFTER MOVANT'S WITHDRAWAL FROM THE CONSPIRACY

D. Ground four: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story briefly *without* citing cases or law): COUNSEL DID NOT ARGUE AT SENTENCING THAT MOVANT HAD EFFECTIVELY WITHDRAWN FROM THE CONSPIRACY BEFORE THE INITIATION OF THE NEGOTIATIONS THAT RESULTED IN THE DELIVERY OF 16 KILOGRAMS OF COCAINE. FOR WHICH HE WAS HELD RESPONSIBLE

NOTE: FOR GROUNDS E-L, SEE ATTACHMENT

13. If any of the ground listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: INEFFECTIVE ASSISTANCE OF COUNSEL (A-F, I, K AND L) NEWLY DISCOVERED EVIDENCE (G) NEWLY AVAILABLE OR DEVELOPED EVIDENCE (H AND J)

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing E. POMEROY WILLIAMS, P.O. BOX 2139 SAVANNAH, GA 31498-1001

(b) At arraignment and plea SAME

(c) At trial SAME

(d) At sentencing SAME

(e) On appeal SAME

(f) In any post-conviction proceeding PRO SE

(g) On appeal from any adverse ruling in a post-conviction proceeding PRO SE

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes (X) No. ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 04/18/97
(date)

/s/ [Illegible]
Signature of Movant

ATTACHMENT TO 2255 MOTION – PAGE 1 OF 3

12. E. GROUND FIVE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

COUNSEL DID NOT OBJECT TO THE INTRODUCTION OF PREJUDICIAL INADMISSIBLE HEARSAY EVIDENCE AT TRIAL

F. GROUND SIX : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

COUNSEL FAILED TO ARGUE ON DIRECT APPEAL THAT MOVANT COULD NOT BE HELD RESPONSIBLE FOR THE 16 KILOGRAMS OF COCAINE DISTRIBUTED BY OTHERS, BECAUSE THIS AMOUNT WAS NOT REASONABLE FORESEEABLE AND WITHIN THE SCOPE OF MOVANT'S CONSPIRATORIAL AGREEMENT

G. GROUND SEVEN : MOVANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND FIFTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED AT TRIAL

AT MOVANT'S TRIAL, THE GOVERNMENT KNOWINGLY PERMITTED SEVERAL OF ITS WITNESSES TO COMMIT PERJURY AND ALSO

KNOWINGLY WITHHELD MATERIAL IMPEACHING AND EXCULPATORY EVIDENCE

H. GROUND EIGHT : MOVANT'S SENTENCE WAS ENHANCED IN VIOLATION OF THE CONSTITUTION

AT MOVANT'S SENTENCING, HIS SENTENCE WAS ENHANCED BASED ON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION

I. GROUND NINE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

MOVANT'S COUNSEL WAS INEFFECTIVE WHEN AT MOVANT'S TRIAL HE FAILED TO OBJECT TO A CO-DEFENDANT'S INVOCATION OF THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION, WHERE CO-DEFENDANT'S TESTIMONY, WHICH WOULD HAVE EVIDENCED THE EXISTENCE OF MULTIPLE CONSPIRACIES, WOULD HAVE BEEN LIMITED TO CONDUCT TO WHICH CO-DEFENDANT HAD PLED GUILTY, AND WHERE, IF NECESSARY, MOVANT WOULD HAVE ASKED FOR SEVERANCE FROM HIS OTHER TWO CO-DEFENDANTS JOINTLY TRIED

J. GROUND TEN : MOVANT WAS CONVICTED OF TWO OFFENSES OF WHICH HE IS FACTUALLY AND LEGALLY INNOCENT, CONSTITUTING A MISCARRIAGE OF JUSTICE

MOVANT'S CONVICTION WAS OBTAINED BECAUSE HE WAS UNABLE TO PRESENT TESTIMONIAL EVIDENCE BY TWO OF HIS CO-DEFENDANTS, ONE THAT WAS A FUGITIVE AT THE TIME OF THE TRIAL, AND ANOTHER WHO REFUSED TO TESTIFY, UNDER THE PROTECTION OF THE FIFTH AMENDMENT, WITNESSES

WHO WOULD HAVE PRESENTED COMPELLING AND UNDISPUTABLE EVIDENCE THAT MOVANT WAS FACTUALLY AND LEGALLY INNOCENT OF THE CRIMES OF CONVICTION

K. GROUND ELEVEN : THE LABORATORY ANALYSIS OF THE SUBSTANCE SEIZED WAS INACCURATE IN VIOLATION OF MOVANT'S DUE PROCESS RIGHT UNDER THE FIFTH AMENDMENT

THE LABORATORY ANALYSIS OF THE SUBSTANCE SEIZED IN THE INVESTIGATION WAS INACCURATE, BOTH, IN THE TYPE OF SUBSTANCE SEIZED, WHICH ACTUALLY WAS NOT A CONTROLLED SUBSTANCE, AND IN THE QUANTITY OF SUBSTANCE SEIZED

L. GROUND TWELFE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

MOVANT'S COUNSEL WAS INEFFECTIVE WHEN HE DID NOT CHALLANGE THE ACCURACY OF THE LABORATORY ANALYSIS OF THE QUANTITY AND TYPE OF SUBSTANCE SEIZED DURING THE INVESTIGATION OF THE CASE

DECLARATION

I, JUNJI YAMAMOTO, hereby declare, under penalty of perjury, that:

1. I am the Junji Yamamoto named in criminal case CR-491-142, from the United States District Court for the Southern District of Georgia.

2. On March 11, 1993, I was convicted of Conspiracy to Import Cocaine, Conspiracy to Possess Cocaine with Intent to Distribute, and two counts of Possession of Cocaine for Distribution.

3. I have personally known Hernan Castro since 1984.

4. I have personally known Carlos Chang-Tsutsumi since 1986.

5. I have never introduced Chang to Castro, nor have I ever mentioned or referred to Chang before Castro.

6. From early 1990 to the beginning of August 1990, and after repeated telephone calls from Michael Lowe requesting a meeting, I asked Castro to meet him, on my behalf, in Minneapolis, Minnesota.

7. On or about October ___, 1990, I met with Castro at my apartment in Panama City, Panama. During Castro's two-day stay in Panama City, we had a conversation about Castro's trip to Minneapolis, Minnesota, on August 11, 1990. Castro told me that Michael Lowe's wife, Lynn Lowe, whom he had met at the Minneapolis/St. Paul Airport, had told him that Michael Lowe was interested in obtaining a cocaine source for a customer.

8. In a telephonic conversation with Michael Lowe in early 1991, I told him that Castro was no longer involved in drug trafficking, as Castro had told me in his October 1990 visit to Panama City, Panama.

9. As far as I know, Castro played no part, nor had any interest in the negotiations, nor in the deliveries of cocaine made or caused to be made by Carlos Chang on April 11 and July 11, 1991, to Savannah, Georgia.

10. As far as I know, there were three separate efforts, through three entirely unrelated sources, to find a cocaine source of supply for DEA agent Douglas Driver: The alleged negotiations between Driver and Beatriz Lara-Aris in San Jose, Costa Rica, in December of 1989; Castro's alleged negotiations with Lynn Lowe, in Minneapolis, Minnesota, on August 11, 1990; and Chang's alleged negotiations with the Lowes and Driver, from April to July of 1991.

11. If called to testify, my testimony will reflect the above stated, which is true and correct to the best of my knowledge and belief.

~~Executed at the Federal Correctional Institution at Talladega, Alabama, this ___ day of the month of _____ of 1996.~~

/s/ Junji Yamamoto
Junji Yamamoto

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	]]]]]]]]	CIVIL ACTION NO.: CV497-097 Underlying CR491-142

ORDER

(Filed Apr. 13, 1998)

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. The Court finds it appropriate to address whether the affidavit of Jungi Yamamoto supports Petitioner's claim of actual innocence because Petitioner withdrew from the conspiracy. Yamamoto's affidavit demonstrates that Petitioner negotiated with Lynn Lowe to supply cocaine for Agent Driver. (Yamamoto's Aff. ¶ 10.) Yamamoto claims that in early 1991, he told Agent Driver that Petitioner no longer engaged in drug trafficking. (Yamamoto's Aff. ¶ 8.) This statement does not demonstrate that Petitioner withdrew from the conspiracies to supply Agent Driver with cocaine. There is no evidence to suggest that Petitioner affirmatively communicated to Yamamoto, Lowe, Driver, or other members of the conspiracy that he no longer wished to participate in drug trafficking. He has not satisfied the legal requirements of withdrawal. *See United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (requiring co-conspirator to make reasonable effort to communicate withdrawal to co-conspirators).

Yamamoto's affidavit, at best, argues that the government proved the existence of multiple conspiracies and not one conspiracy. This argument was rejected by juries at Petitioner's trial and at Yamamoto's trial. Viewed in the light most favorable to the government, as required by *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979), Yamamoto's statement, "there were three separate efforts, through three entirely unrelated sources, to find a cocaine source of supply for DEA agent Douglas Driver," does not disprove the existence of a single conspiratorial goal to supply Agent Driver with cocaine. Each conspirator was linked to the conspiracy through Yamamoto. This "new evidence" fails to exculpate Petitioner, as the government proved that he conspired with Yamamoto in his scheme to import cocaine and distribute it to Agent Driver.

Accordingly, the Report and Recommendation of the Magistrate Judge, as clarified above, is adopted as the opinion of the Court. The petition for a writ of habeas corpus is **DENIED**.

SO ORDERED, this 13 day of April, 1998.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

CASTRO	:	
VS.	:	CASE NO.
USA	:	CV497-97 & CR491-142

The undersigned, a regularly appointed and qualified deputy in the office of the Clerk of this District, while conducting the business of the Court for said Division does hereby certify the following:

1: Pursuant to instructions from the Court, and in the Performance of my official duties, I personally placed in The U. S. Mail a sealed envelope bearing the lawful frank Of the Court, and properly addressed to each of the Persons, parties or attorneys named below; and

2: That the aforementioned envelope(s) contained a copy of The document dated April 13, 1998, which is a part of The official records of this case.

Date of mailing: April 13, 1998
Date of certificate: (x) same date

HENRY R. CRUMLEY, JR., CLERK

by /s/ [Illegible]

NAME:
1: HERNAN O'RYAN CASTRO, P. O. BOX 7001, TAFT, CA 92=3268
2: TERRY LEE LLOYD

___ District Judge
_x_ Magistrate Judge
_x_ Minutes

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-8751

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

---

(Filed Feb. 10, 1999)

ORDER:

Appellant's motion for certificate of appealability is GRANTED on the following issue only:

> Whether counsel was ineffective by not adequately arguing to suppress appellant's post-arrest statements.

No certificate of appealability should issue on the remaining issues appellant raises, because he failed to make a substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c)(2).

Appellant's motion for leave to proceed *in forma pauperis* on appeal is GRANTED.

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
For the Eleventh Circuit

No. 98-8751
Non-Argument Calendar

District Court Docket Nos. 97-00097-4-CV,
CR491-142

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

JUDGMENT

(Filed Jun. 13, 2000)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: June 13, 2000
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUL 13 2000

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8751
Non-Argument Calendar

D.C. Docket No. 97-00097-4-CV-
CR491-142

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(June 13, 2000)

Before ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

PER CURIAM:

Herman O'Ryan Castro appeals the denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. On appeal Castro argues that the district court erred in finding his counsel was not ineffective by failing

to argue for suppression of his post-arrest statements because the post-arrest statements should have been suppressed and their suppression would have changed the outcome of the trial. Castro argues that after the officers read him is *Miranda* rights, he stated he wished to exercise these rights and such a statement was sufficient to assert his Sixth Amendment right to counsel. Castro also argues that use of his post-arrest statements violated his Sixth Amendment right to counsel because the officers continued to question him after he had asserted his rights and, even if he had not asserted his rights, he never effectively waived those rights. Castro's certificate of appealability limits his appeal to the issue of ineffective assistance of counsel.

In a § 2255 proceeding, we review legal issues *de novo* and factual findings for clear error. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999). A claim for ineffective assistance of counsel presents a mixed question of law and fact and our review is plenary. *Vines v. United States*, 28 F.3d 1123, 1127 (11th Cir. 1994).

In order to succeed with a challenge based on ineffective assistance of counsel, a petitioner has to satisfy a two part test. First, the petitioner must show that counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This means that the petitioner must show that the representation provided by counsel was outside the "wide range of competent assistance" and he must also overcome the presumption of competence. *Id.* at 690, 104 S. Ct. at 2066. In analyzing counsel's competence, the court must apply a "heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066. Second, the petitioner must show that the performance prejudiced the

defense, so that the result of the trial is not reliable. *See id.* To satisfy the test, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Furthermore, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, *see id.*, or vice versa.

There are two sources of the right to counsel, the Fifth Amendment and the Sixth Amendment. The Sixth Amendment right attaches "at or after the initiation of adversary judicial proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 2297 (1984) (internal quotations omitted). While this right can be waived, the burden is on the government to show that this was "an intentional relinquishment or abandonment of a known right or privilege." *Stokes v. Singletary*, 952 F.2d 1567, 1578 (11th Cir. 1992). Waiver of the right must be "voluntary, knowing and intelligent," and the determination of voluntariness depends on "the particular facts and circumstances of each case." *Id.* If after the Sixth Amendment right to counsel attaches one asserts a right to counsel, a subsequent waiver of the right is presumed invalid, even if it was given voluntarily, knowingly, and intelligently when it was secured pursuant to police-initiated conversation. *See Michigan v. Jackson*, 475 U.S. 625, 636, 106 S. Ct. 1404, 1411 (1986).

Here, the court below found that Castro could not satisfy the prejudice prong of the standard for ineffectiveness assistance of counsel. However, it appears that the court did not apply the Sixth Amendment analysis and examined the facts only in reference to the Fifth Amendment law. As conceded by the United States, Castro's Sixth Amendment right to counsel attached when he was arrested because he was indicted before his arrest. Additionally, it appears that the court below did not hold an evidentiary hearing, which would have facilitated the determination of voluntariness. Similarly, the appointment of counsel for Castro would assist the court. Finally, there is some question of whether this petition is successive. Accordingly, we vacate the decision of the court below and remand with instructions to the court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim and examine the record to determine if this petition is successive.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

ORDER

(Filed Jan. 30, 2001)

Let a copy of this Report and Recommendation be served upon the parties. The parties will be allowed ten (10) days from the date of service of this Report and Recommendation to file objections. If no objections are made, this Report and Recommendation will be adopted as a record of the proceedings and may become the opinion and order of the Court. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

All requests for additional time to file any objections to this Report and Recommendation should be filed with the Clerk for consideration by the District Judge to whom this case is assigned for his determination.

The Clerk of Court is directed to submit the Report and Recommendation with objections, if any, on the 19th day of February, 2001.

SO ORDERED, this 30th day of January, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Jan. 30, 2001)

Petitioner Hernan O'Ryan Castro, an inmate at the Federal Correctional Institution in Taft, California, filed a *pro se* Motion pursuant to 28 U.S.C. § 2255 contesting the legality of his confinement. (2255 Dkt. No. 1.) Respondent filed a Response to the Motion and Petitioner subsequently filed a Traverse to the Response. (2255 Dkt. Nos. 4; 20; 21.) On February 24, 1998, after carefully considering the pleadings, the undersigned issued a Report and Recommendation recommending that Petitioner's Motion be denied on its merits. (2255 Dkt. No. 25.) Petitioner filed objections to the Report and Recommendation, which the Court addressed in its April 13, 1998 Order adopting the Report and Recommendation. (2255 Dkt. No. 29.) Thereafter, Petitioner filed an appeal to the Eleventh Circuit Court of Appeals. (2255 Dkt. No. 32.) On appeal, the Eleventh Circuit vacated the District Court's Order denying Petitioner's Motion

and remanded the case for a determination of whether Petitioner had filed a successive petition. (2255 Dkt. No. 40.) The Eleventh Circuit also instructed the Court to (1) more fully develop the facts supporting Petitioner's claim that he had been denied effective assistance of counsel through his counsel's failure to move to suppress his post-arrest statements under the Sixth Amendment, and (2) analyze Petitioner's claim under the Sixth Amendment. (*Id.*)

Respondent then filed a Motion to Dismiss Petitioner's § 2255 Motion, asserting that it is a successive petition under the Antiterrorism and Effective Death Penalty Act,[1] ("AEDPA") as codified at 28 U.S.C. § 2255 (2255 Dkt. No. 44.) Petitioner filed a Response to Respondent's Motion to Dismiss. (2255 Dkt. No. 47.) In compliance with the instructions by the Eleventh Circuit, the undersigned appointed counsel to represent Petitioner and held an evidentiary hearing on September 29, 2000. Following the evidentiary hearing, Petitioner's counsel and Respondent filed post-hearing Briefs. (2255 Dkt. Nos. 51; 55.) Petitioner then filed a Supplemental Brief on his own behalf. (2255 Dkt. No. 56; 57.) Respondent filed a Response to Petitioner's

[1] Petitioner filed the instant section 2255 motion on April 18, 1997, the date he signed his motion in preparation for mailing it to the Court. *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (holding that "a pro se prisoner's motion to vacate is deemed filed the date it is delivered to prison authorities for mailing."). As Petitioner filed his motion after the April 24, 1996 enactment date of the AEDPA, its provisions are applicable to the motion, even though Petitioner's first § 2255 was adjudicated prior to the enactment of the AEDPA. *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996).

Supplemental Brief. (2255 Dkt. No. 58.) As the undersigned has determined that Petitioner's Motion is successive, the merits of his Sixth Amendment claim will not be addressed.

STATEMENT OF THE CASE

Petitioner is confined as a result of an April 1992 conviction obtained in this Court for conspiracy to possess with intent to distribute cocaine and to distribute cocaine and conspiracy to import cocaine. On July 14, 1992, Petitioner was sentenced to 240 months' imprisonment. Petitioner subsequently appealed his conviction and sentence. In its March 24, 1994 decision, the Eleventh Circuit Court of Appeals affirmed Petitioner's conviction and sentence. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994).

On July 11, 1994, Petitioner filed a motion for a new trial based on newly discovered evidence that the Government had entered into an immunity agreement with a witness that testified against Petitioner at his trial. (Crim. Dkt. Nos. 333; 334.) In his motion, Petitioner first alleged that the Government's failure to disclose the immunity agreement violated the doctrines set forth in *Brady v. Maryland* and *Giglio v. United States*. (Crim. Dkt. No. 334.) Additionally, Petitioner asserted that the Government knowingly used perjured testimony to obtain his conviction. (Crim. Dkt. No. 334.) In its response to Petitioner's motion for a new trial, the Government indicated that it did not object to Petitioner's motion being construed as both as motion for a new trial under Federal Rule of Criminal Procedure 33 and a *habeas corpus* motion to vacate his sentence under 28 U.S.C. § 2255. (Crim. Dkt.

No. 340.) Petitioner filed a reply to the Government's response, in which he stated that he properly filed his motion for a new trial under Federal Rule of Criminal Procedure 33. (Crim. Dkt. No. 346.) However, Petitioner did not object to the Government's suggestion that his motion be construed as one under Rule 33 and 28 U.S.C. § 2255. (*Id.*)

In an order denying Petitioner's motion for a new trial, the District Court considered Petitioner's motion as requesting relief under both Rule 33 and 28 U.S.C. § 2255. (Crim. Dkt. No. 352.) Petitioner appealed the denial of his motion to the Eleventh Circuit Court of Appeals, asserting that the District Court erroneously denied his motion for a new trial and failed to hold an evidentiary hearing on his motion. (Pet'r Appellate Br., Ex C. to Resp't Post-Hearing Br.) However, Petitioner did not appeal the District Court's ruling on his motion under both Rule 33 and 28 U.S.C. § 2255. (*Id*; Pet'r Reply Br., Ex. E to Resp't Post-Hearing Br.) In its opinion affirming the District Court's denial of Petitioner's motion, the Eleventh Circuit Court of Appeals stated that the appeal arose "from the denial or relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for a new trial, Fed. R. Crim. P. 33." (Crim. Dkt. No. 367.)

DISCUSSION AND CITATION OF AUTHORITY

In 1996, Congress amended 28 United States Code § 2255 to reduce the number of successive petitions filed by inmates. Section 2255, as amended by the AEDPA, permits a successive petition to be brought in a district court by an inmate only after a panel of the court of appeals certifies that the successive petition contains (1)

newly discovered evidence that would support a determination that no reasonable factfinder would have found the petitioner guilty or (2) a new rule of constitutional law made retroactive by the United States Supreme Court to cases on collateral review. 28 U.S.C. § 2255; *see In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997) (holding that a successive *habeas corpus* petition that is filed in the district court prior to obtaining authorization from the court of appeals for the filing of said petition must be dismissed.).

Respondent has moved to dismiss this § 2255 motion, asserting that it is successive and that Petitioner failed to seek and obtain authorization from the Eleventh Circuit Court of Appeals prior to filing it. Respondent asserts that the Sixth Amendment claim raised by Petitioner in this motion could have been raised in his first § 2255 motion. Therefore, Respondent alleges that the Sixth Amendment claim cannot be raised in a successive petition without proper certification by the Eleventh Circuit. Petitioner disputes that his instant § 2255 motion is successive under the AEDPA. Specifically, Petitioner asserts that he filed his motion for a new trial pursuant only to Federal Rule of Criminal Procedure 33 and the Court improperly construed his motion as one under 28 U.S.C. § 2255, as he did not raise any constitutional claims in his motion for a new trial.

The filing of a motion for a new trial under Federal Rule of Criminal Procedure 33 "does not preclude consideration of the motion as a petition for relief under the federal habeas corpus statute," especially where the claim raised by a movant implicates his constitutional rights. *United States v. Dibernardo*, 880 F.2d 1216, 1226 (11th Cir. 1989). Claims for a new trial based on the prosecutor's

failure to disclose exculpatory evidence and the use of perjured testimony implicate the right to due process. *Giglio v. United States*, 405 U.S. 150, 151-53, 92 S. Ct. 763, 764-66, 31 L. Ed. 2d 104 (1972); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Therefore, these claims may properly be brought in a *habeas corpus* motion. *See, e.g., DeMarco v. United States*, 928 F.2d 1074, 1075 (11th Cir. 1991); *Boschen v. United States*, 845 F.2d 921, 922 (11th Cir. 1988).

In the case *sub judice*, the District Court properly construed Petitioner's motion as both a motion for a new trial under Federal Rule of Criminal Procedure 33 and a 28 U.S.C. § 2255 motion. In his motion, Petitioner asserted his right to a new trial based on alleged constitutional violations by the Government during his trial. Specifically, Petitioner alleged that the Government violated the rules enunciated in *Brady* and *Giglio* when it failed to disclose exculpatory evidence and used perjured testimony. As such, Petitioner's claims were based on his constitutional right to due process and were more properly raised in a 28 U.S.C. § 2255 motion.

The failure of Petitioner's trial counsel to move to suppress his post-arrest statements, which Petitioner seeks to raise in his current § 2255 motion, was a claim available to Petitioner at the time he filed his initial motion for a new trial. Petitioner was well aware of the circumstances surrounding his post-arrest statements prior to his trial and the filing of his motion. Furthermore, Petitioner had an opportunity to raise this claim during the adjudication of his motion for a new trial, either in his reply to the Government's response or on appeal of the denial of his motion. As Petitioner failed to raise this claim in his motion for a new trial, which was properly

construed to also include § 2255 claims, he cannot now bring this claim in a successive motion without proper authorization from the Eleventh Circuit Court of Appeals. Because Petitioner filed his successive *habeas corpus* petition in this Court prior to obtaining authorization from the Eleventh Circuit Court of Appeals, his petition should be dismissed.

CONCLUSION

For the above and foregoing reasons, it is my **RECOMMENDATION** that Respondent's motion to dismiss be **GRANTED**. Petitioner's motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255, should be **DISMISSED**.

SO REPORTED and **RECOMMENDED**, this 30th day of January, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

ORDER

(Filed Apr. 11, 2001)

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. In his Objections to the Magistrate Judge's Report and Recommendation, Petitioner asserts that the Magistrate Judge erroneously concluded that his motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255, is successive because this Court improperly construed an earlier pleading filed under Federal Rule of Criminal Procedure 33 as a motion under § 2255. Petitioner cites for the first time in his Objections several circuit court cases that have held that a district court may not *sua sponte* re-characterize a pleading filed by a *pro se* prisoner as one brought pursuant to 28 U.S.C. § 2255 unless the prisoner (1) consents to the re-characterization with knowledge of the consequences of re-characterizing his pleading under § 2255, or (2) is permitted to amend the pleading to raise all his claims or withdraw the pleading

prior to said re-characterization. *See United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *United States v. Evans*, 224 F.3d 670, 674-75 (7th Cir. 2000); *United States v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1999); *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998). Petitioner urges this Court to adopt the reasoning in these cases that the re-characterization of a pleading as a § 2255 motion without notice to or the consent of the prisoner has unfair consequences under the Antiterrorism and Effective Death Penalty Act ("AEDPA"): namely that such re-characterization bars the prisoner from brining another § 2255 motion raising additional constitutional claims.

The Eleventh Circuit Court of Appeals has yet to address this issue. However, this Court finds that the cases relied on by Petitioner are in opposite to the case *sub judice* for several reasons. First, Petitioner was put on notice by the Government's response to his motion for a new trial, filed under Federal Rule of Criminal Procedure 33, that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion. Second, Petitioner never objected to the characterization of his motion as one under § 2255, a fact that is distinguishable from the prisoners in both *Adams* and *Miller*. *See Miller*, 197 F.3d at 647; *Adams*, 155 F.3d at 583. Finally, the concerns expressed in the circuit court cases cited above, which supports the courts' holdings, that it is unfair to re-characterize a prisoner's pleading as a § 2255 motion because of the AEDPA's limitation on successive petitions are not supported by legal precedent. Contrary to the court's assertions that the AEDPA has caused severe consequences by limiting

successive petitions, common law precedent, prior to the AEDPA, placed the same restrictions on successive petitions as that stated in the AEDPA. *Kelly*, 235 F.3d at 1242 n.4 (noting that "succcessiveness concerns predate AEDPA, which essentially codified the successiveness rule."). The AEDPA merely codified the pre-existing law. As Petitioner states in his Objections, pre-AEDPA law "would have prevented movant from filing a section 2255 presenting other claims known at the time." Because Petitioner may have known of the consequences of having his motion for a new trial construed as a § 2255 motion and was put on notice of said re-characterization, the Magistrate Judge correctly concluded that Petitioner's current § 2255 motion is successive.

Petitioner has not presented any evidence to support his allegations that the Magistrate Judge's findings were erroneous. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court. The motion for a writ of *habeas corpus* is **DISMISSED**.

SO ORDERED, this 11th day of April, 2001.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
JUDGE, UNITED STATES
DISTRICT JUDGE

United States District Court
Southern District of Georgia

HERNAN O'RYAN CASTRO v. UNITED STATES OF AMERICA	JUDGMENT IN A CIVIL CASE CASE NUMBER: CV 497-097/CR 491-142

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the Court's Order of April 11, 2001, adopting the Magistrate Judge's Report and Recommendations, Petitioner's Motion for a Writ of Habeas Corpus filed pursuant to Title 28, United States Code, Section 2255, is DISMISSED.

April 11, 2001
Date

/s/ Henry R. Crumley, Jr.
Clerk

/s/ Jan Purvis
(*By*) *Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.: CV497-097
v.	)	
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

Certificate of Appealability/
Probable Cause to Appeal

(Filed Apr. 25, 2001)

Pursuant to 28 U.S.C. § 2253(c), an appeal may not be taken in this matter unless the Court issues a Certificate of Appealability. This certificate may issue only if Petitioner has made a substantial showing of the denial of a constitutional right, and (if granted) the certificate must indicate which specific issue or issues satisfy this showing. In accordance with the foregoing, a Certificate of Appealability is hereby

X **GRANTED** ___ **DENIED**

for the following reasons and (if granted) with respect to the following issue(s): *Whether the 28 U.S.C. § 2255 petition filed by Castro is a successive petition.*

Transcripts of Proceedings

X This Court will not presently require the preparaction of a transcript or the payment therefor by the United States. To the extent that a transcript of any portion of the District Court proceedings is required, the Court of Appeals may more economically direct which proceedings it requires to be transcribed.

X The Court Reporter shall transcribe the proceedings as requested by the party *in forma pauperis* and the United States shall bear the expense.

SO ORDERED, this 25 day of April, 2001.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
JUDGE, UNITED STATES
DISTRICT JUDGE

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12181

D. C. Docket No. 97-00097-CV-4

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(January 2, 2002)

Before WILSON, RONEY and FAY, Circuit Judges.

WILSON, Circuit Judge:

Hernan O'Ryan Castro appeals the district court's dismissal of his habeas corpus petition, which was filed pursuant to 28 U.S.C § 2255. The district court concluded that the petition was successive under § 2255, as amended by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), and thus not entitled to consideration. The dismissal of O'Ryan Castro's petition raises an issue of first impression in this Circuit: when a district court recharacterizes a federal prisoner's postconviction motion

as a petition under § 2255, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive petition" within the purview of AEDPA amendments? Finding some of the opinions of our sister circuits who have considered this issue to be persuasive, we hold that O'Ryan Castro's subsequent § 2255 petition cannot be deemed successive.

I. BACKGROUND

In 1992, O'Ryan Castro was convicted and sentenced to twenty years of imprisonment for conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846, possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine in violation of 21 U.S.C. § 963. We affirmed the convictions and sentence on March 24, 1994. On July 11, 1994, O'Ryan Castro filed a pro se Motion For New Trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence. The evidence consisted of proof that a witness, who testified against him at trial, had entered into an immunity agreement with the government. The government submitted a response in which it stated that it did not object to the motion as demanding relief under both Rule 33 and § 2255. O'Ryan Castro then filed a pro se reply in which he explained that he had filed his motion properly under Rule 33. The district court treated O'Ryan Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and denied it on October 28, 1994. We affirmed the district court's ruling.

On April 22, 1997, O'Ryan Castro filed his first self-styled § 2255 habeas petition, alleging, among other

things, that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court denied this petition and O'Ryan Castro appealed. After granting a certificate of appealability on the ineffective assistance claim, we vacated the order denying his petition and remanded the matter for further evidentiary determinations. We also instructed the district court to examine the record to determine whether O'Ryan Castro's petition was successive. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

II. STANDARD OF REVIEW

"We review de novo a district court's denial of habeas corpus relief." *Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir. 2001). "A district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Id.*

III. DISCUSSION

Due to the frequency in which pro se litigants draft incognizable motions, "[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir. 1990). This accommodation was the result of the time-honored practice of construing pro se plaintiffs' pleadings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam). In accordance with this practice, "district courts routinely convert postconviction motions of prisoners who

unsuccessfully seek relief under some other provision of law into motions made under . . . § 2255 and proceeded to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States,* 155 F.3d 582, 583 (2d Cir. 1998) (per curiam). These conversions were justified because they were harmless and they also assisted prisoner-movants in dealing with legal technicalities that might otherwise preclude prompt adjudication of their claims. *Id.* "Several courts of appeals . . . have endorsed this approach as fair and efficient." *United States v. Miller,* 197 F.3d 644, 648 (3d Cir. 1999).

On April 24, 1996, however, the AEDPA took effect and significantly altered the innocuousness of liberally recharacterizing a petitioner's postconviction motion. The AEDPA, which amended § 2255, bars federal prisoners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances.[1] Specifically, successive applications may be heard only after an appellate court certifies the petition, because it contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

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[1] "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson,* 477 U.S. 436, 444 n.6 (1986). A petitioner abuses the writ when he "files a petition raising grounds that were available but not relied upon in a prior petition." *Id.*

28 U.S.C. § 2255. "If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as" successive. *Adams,* 155 F.3d at 583. Consequently, a "court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights." *Id.* at 583-84.

O'Ryan Castro filed his initial Rule 33 motion[2] prior to the enactment of the AEDPA and his subsequent § 2255 petition after the AEDPA became effective. Despite the fact that O'Ryan Castro filed his Rule 33 motion before the AEDPA's effective date, it nonetheless has the capacity to trigger the procedural strictures that the AEDPA attaches to successive habeas petitions. *See Raineri v. United States,* 233 F.3d 96, 99 (1st Cir. 2000). This raises the question of whether the district court properly considered O'Ryan Castro's Rule 33 motion as his first § 2255 petition, making his subsequent § 2255 petition successive.

Several circuits have prescribed specific guidelines for construing a claimant's self-styled § 2255 petition when a district court has recharacterized a claimant's prior postconviction motion as a § 2255 petition. The First Circuit, in particular, decided a case that is strikingly similar to the present case. The petitioner in *Raineri,* like O'Ryan Castro, brought a "Motion for Correction of Sentence and/or New Trial" pursuant to Federal Rule of Criminal Procedure 35 and/or Rule 33 prior to the

[2] The district court converted this motion into a § 2255 petition.

AEDPA's effective date. *Id.* at 98. The district court, acting sua sponte, found Rules 33 and 35 inapplicable and recharacterized the motion as an application for relief under § 2255. *Id.* The petitioner submitted a subsequent motion styled as a § 2255 petition that the district court deemed successive and thus dismissed for his failure to obtain the requisite authorization to proceed with a successive petition. *Id.* at 99. In reversing this dismissal, the First Circuit concluded that "because the court acted sua sponte and without any advance notice to the petitioner, [it could not] treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." *Id.* at 100-01. In reaching this decision, the First Circuit, persuaded by holdings of the Second and Third Circuits in prior cases, gave due consideration to the importance of protecting a claimant's right to habeas review. *Id.* at 99-101.

Two years before the First Circuit decided *Raineri,* the Second Circuit held,

> At least until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized.

Adams, 155 F.3d at 584. Similarly, the Third Circuit, "conclude[d] that district courts should discontinue their practice of automatically treating pro se, postconviction motions as § 2255 petitions." *United States v. Miller,* 197 F.3d 644, 652 (3d Cir. 1999). The Third Circuit, however, went a step further than the procedure announced by the Second Circuit, stating that

> upon receipt of pro se pleadings challenging an inmate's conviction or incarceration – whether styled as a § 2255 motion or not – a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period.

Id. It also held that this rule was narrow and would apply prospectively – meaning that "a pro se petitioner who filed a pre-AEDPA pleading, which was recast as a § 2255 motion, is bound by the existing provisions of AEDPA regarding successive second or successive petitions." *Id.*[3]

In addition to the First Circuit, the Seventh, Ninth, and Tenth Circuits have adopted the views expressed by

[3] We should note that the petitioners in both *Adams* and *Miller* filed their initial postconviction motions after the effective date of the AEDPA. *Adams,* 155 F.3d at 582-83; *Miller,* 197 F.3d at 652-53.

the Second and Third Circuits. *See Henderson v. United States,* 264 F.3d 709, 711 (7th Cir. 2001) (holding that a court should not deem a Rule 33 or other mislabeled motion a § 2255 motion "unless the movant has been warned about the consequences of his mistake"); *United States v. Kelly,* 235 F.3d 1238, 1242 (10th Cir. 2000) ("[w]e hold that district courts should use the procedure adopted in *Adams* for dealing with pro se postconviction motions not expressly made under § 2255 . . . ."); *United States v. Seesing,* 234 F.3d 456, 464 (9th Cir. 2000) (adopting the procedure set forth in *Adams* to address circumstances where a court is presented with a pro se motion that could be recharacterized as a § 2255 motion).

Only one circuit has taken an opposite approach on this issue. In *In re Tolliver,* 97 F.3d 89, 90 (5th Cir. 1996) (per curiam), which was the first case to address this issue, the Fifth Circuit upheld the district court's unilateral recharacterization of the petitioner's previous pro se motion as a § 2255 motion and held that, because the petitioner had filed such a motion, any subsequent § 2255 motion he filed required certification by a court of appeals. The court also determined that despite the petitioner's objection to the district court's conversion of his initial postconviction motion, the motion was incapable of being construed as anything other than a § 2255 motion. *Id.* In discussing *Tolliver,* the Third Circuit noted that the case "was decided two years before *Adams* and almost immediately after AEDPA's enactment." *Miller,* 197 F.3d at 651. It opined that the Fifth Circuit may have decided the case differently if it had the benefit of the Second Circuit's discussion. *Id.* We find this assertion remarkably plausible, because we certainly are persuaded by the courts that have discussed this issue since *Tolliver.*

Unlike the petitioner in *Tolliver,* O'Ryan Castro's Rule 33 motion for a new trial asserted a cognizable ground for relief. The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion. *See United States v. Kersey,* 130 F.3d 1463, 1465 n.2 (11th Cir. 1997). In response to the government's motion, the district court considered the motion as requesting relief under both Rule 33 and § 2255. Thus, also unlike *Adams, Miller,* and *Raineri,* the district court acted on the government's motion, and not sua sponte. This, however, is a distinction without a difference. The more critical factor is whether O'Ryan Castro knew the consequences of the district court's actions; and much the same as the litigants in *Adams, Miller, Henderson,* and *Raineri,* there was no protocol in place to ensure that O'Ryan Castro had such knowledge. Because O'Ryan Castro filed his initial postconviction motion pre-AEDPA, it is inconceivable that he, or any pro se litigant during that time, could have foreseen the ultimate consequences of a district court's recharacterization (sua sponte or upon the government's motion) of his postconviction motion. When the district court recharacterized his Rule 33 motion, O'Ryan Castro made the effort to reply in a manner that reaffirmed his intent to move for a new trial under that rule rather than seek habeas relief. It is therefore probable, not just possible, to conclude that he would have mounted a much stronger campaign to defeat the district court's recasting of his Rule 33 motion if he was aware that his subsequent § 2255 petition would face nearly insurmountable scrutiny.

In sum, we join the majority of circuits that have addressed this issue. Whether a petitioner's initial postconviction motion was filed before or after the AEDPA's

effective date or whether the district court's recharacterization of that motion was sua sponte or upon the government's motion, a district court's recharacterization of a petitioner's initial postconviction motion will not be considered a "first" habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization. Requiring a district court to ensure that a petitioner realizes the ramifications of a court's decision to convert his postconviction motion is an appropriate means of apprizing all defendants of the circumstances that may impair or preserve their right to habeas review. We do not endeavor to burden the district courts with onerous disclosure requirements. As long as a petitioner is not blindsided by having to meet the new criteria in § 2255 for successive petitions, the district court's obligation is satisfied.

IV. CONCLUSION

The district court's dismissal of O'Ryan Castro's § 2255 petition is hereby VACATED. We find that O'Ryan Castro's § 2255 petition is not successive and REMAND this case to the district court to consider the merits of his petition.

VACATED and **REMANDED**.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12181

D. C. Docket No. 97-00097-CV-4

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(May 7, 2002)

Before WILSON, RONEY and FAY, Circuit Judges.

WILSON, Circuit Judge:

We vacate our prior opinion, which was reported at 277 F.3d 1300, and substitute this opinion in its place.

Hernan O'Ryan Castro appeals the district court's dismissal of his habeas corpus petition, which was filed pursuant to 28 U.S.C. § 2255. The district court concluded that the petition was successive under § 2255, as amended by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), and thus not entitled to consideration.

The dismissal of O'Ryan Castro's petition raises an issue of first impression in this Circuit: when a district court recharacterizes a federal prisoner's postconviction motion as a petition under § 2255, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive" petition within the purview of the AEDPA amendments? We hold that under the AEDPA, O'Ryan Castro's subsequent § 2255 petition was properly deemed successive. However, due to the strict limitations the AEDPA imposes on petitioners who wish to file successive § 2255 petitions, we suggest that in the future, when a district court unilaterally recharacterizes a prisoner's pleading as a § 2255 petition, the judge should also warn the petitioner of the consequences of this recharacterization – that this recharacterized petition may be his first and only chance to seek relief under § 2255.

BACKGROUND

In 1992, O'Ryan Castro was convicted and sentenced to twenty years of imprisonment for conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846, possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine in violation of 21 U.S.C. § 963. We affirmed the convictions and sentence on March 24, 1994. On July 11, 1994, O'Ryan Castro filed a pro se Motion For New Trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence. The evidence consisted of proof that a witness, who testified against him at trial, had entered into an immunity agreement with the government. The government submitted a response in which it stated that it did not object to the motion as demanding relief under both Rule 33 and § 2255. O'Ryan

Castro then filed a pro se reply in which he explained that he had filed his motion properly under Rule 33. The district court treated O'Ryan Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and denied it on October 28, 1994. We affirmed the district court's ruling.

On April 22, 1997, O'Ryan Castro filed his first self-styled § 2255 habeas petition, alleging, among other things, that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court denied this petition and O'Ryan Castro appealed. After granting a certificate of appealability on the ineffective assistance claim, we vacated the order denying his petition and remanded the matter for further evidentiary determinations. We also instructed the district court to examine the record to determine whether O'Ryan Castro's petition was successive. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

STANDARD OF REVIEW

"We review de novo a district court's denial of habeas corpus relief." *Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir. 2001), *cert. denied*, ___ U.S. ___ (2002). "A district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Id.*

DISCUSSION

When O'Ryan Castro filed his motion for new trial pursuant to Rule 33 based upon newly discovered evidence, the district court recharacterized his Rule 33

motion as both a motion for a new trial and a § 2255 motion. As the district court explained, O'Ryan Castro's claims were based upon his constitutional right to due process and were more properly raised in a § 2255 petition.

District courts have always had the power to recharacterize pro se petitioners' motions. In fact, due to the frequency in which pro se litigants draft incognizable motions, "[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir. 1990). This accommodation was the result of the time-honored practice of construing pro se plaintiffs' pleadings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam). In accordance with this practice, "district courts routinely convert post-conviction motions of prisoners who unsuccessfully [seek] relief under some other provision of law into motions made under . . . § 2255 and proceed to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States,* 155 F.3d 582, 583 (2d Cir. 1998) (per curiam).

In this particular case, the district court recharacterized O'Ryan Castro's motion as both a Rule 33 motion and § 2255 petition in 1994. The AEDPA took effect approximately two years later, on April 24, 1996. The AEDPA, which amended § 2255, bars federal prisoners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances. 28 U.S.C. § 2255. Specifically, successive applications may be heard only after an appellate court certifies the petition, because it contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.

In 1997, a year after the AEDPA was enacted, O'Ryan Castro filed a § 2255 petition, arguing ineffective assistance of counsel. Despite the fact that O'Ryan Castro filed his first recharacterized Rule 33 and § 2255 petition before the AEDPA's effective date, we must apply the restrictions set forth under the AEDPA. Congress made no exceptions for those who had filed their § 2255, petitions before the AEDPA was enacted and were now filing their second petitions after the effective date of the AEDPA. Therefore, a second petition has the capacity to trigger the procedural strictures that the AEDPA attaches to successive habeas petitions. *See Raineri v. United States,* 233 F.3d 96, 99 (1st Cir. 2000). "If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as" successive under the AEDPA. *Adams*, 155 F.3d at 583.

In this case, the ineffective assistance of counsel claim was available to O'Ryan Castro at the time he filed his initial motion for new trial, and he had an opportunity to raise this claim during the adjudication of his recharacterized § 2255 petition. Therefore, this subsequent § 2255

petition, filed three years later, is successive because it does not meet either of the two requirements found under the AEDPA – O'Ryan Castro's second petition does not contain newly discovered evidence,[1] nor does the second petition address a new rule of constitutional law.

While we must follow the restrictions on successive petitions as laid out by the AEDPA and find O'Ryan Castro's petition successive under the AEDPA, we can suggest that in the future, district courts should warn petitioners of the consequences of recharacterzing their motions as § 2255 petitions. We have substantial fairness concerns with the result in this case. These same fairness concerns have been articulated by the First Circuit in *Raineri*. 233 F.3d at 99.

The petitioner in *Raineri*, like O'Ryan Castro, brought a Motion for Correction of Sentence and/or New Trial pursuant to Federal Rule of Criminal Procedure 35 and/or Rule 33 prior to the AEDPA's effective date. *Id.* at 98. The district court, acting sua sponte, found Rules 33 and 35 inapplicable and recharacterized the motion as an application for relief under § 2255. *Id.* The petitioner submitted a subsequent motion styled as a § 2255 petition, which the district court deemed successive and thus dismissed for failure to obtain the requisite authorization to proceed with a successive petition. *Id.* at 99. In reversing this dismissal, the First Circuit concluded that "because the court acted sua sponte and without any advance notice to

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[1] According to the magistrate judge, O'Ryan Castro was "well aware of the circumstances surrounding his post-arrest statements prior to his trial and the filing of his motion."

the petitioner, [it could not] treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." *Id.* at 100-01. The court held "that when a district court, acting sua sponte, converts a post-conviction motion filed under some other statute or rule into a section 2255 petition without notice and an opportunity to be heard (or in the alternative, the pleader's informed consent), the recharacterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger AEDPA's gatekeeping requirements." *Id.* at 100.

We are constrained, in this Circuit, to disagree with the holding in *Raineri* because of our view that Congress, in enacting the AEDPA, imposed further restrictions on a prisoner's ability to file a second § 2255 petition. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The [AEDPA] also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners."). Thus, if we were to relieve an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized, we might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions. Without being given any additional instruction by Congress on this particular matter, we must apply the AEDPA restrictions to successive § 2255 petitions and find O'Ryan Castro's petition successive.[2]

[2] Incidentally, Congress could have made an exception to the AEDPA rules involving second motions and petitions for this set of circumstances, but it did not do so. The rule as written by Congress applies across the board to all second filings, except in the two carefully

(Continued on following page)

However, we agree with the First Circuit's remarks that a district court should not "extinguish the petitioner's one clear chance at habeas relief under the AEDPA" without the petitioner's informed consent. *Raineri*, 233 F.3d at 100. Therefore, we feel we must note that in *future* cases where the petitioner is *not* filing a second petition, but rather is asking to *withdraw* his motion or to *include additional claims* after a district court has decided to recharacterize the initial motion as a § 2255 petition, we would agree with a clear majority of the circuits that district courts should warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings. *United States v. Miller*, 197 F.3d 644, 652 (3d Cir. 1999) (stating that "upon receipt of pro se pleadings challenging an inmate's conviction or incarceration – whether styled as a § 2255 motion or not – a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period."); *Adams*, 152 F.3d at 584 (holding that "[a]t least

limited, narrow circumstances that are specified in the statute. *See* 28 U.S.C. § 2255. Therefore, we cannot substitute our judgment regarding this matter for that expressed by Congress and must apply the AEDPA to all petitioners whether or not their initial recharacterized § 2255 petitions were filed before or after the AEDPA was enacted.

until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized"); *see also Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001) (holding that a court should not deem a Rule 33 or other mislabeled motion a § 2255 motion "unless the movant has been warned about the consequences of his mistake"); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000) ("[W]e hold that district courts should use the procedure adopted in *Adams* for dealing with pro se post-conviction motions not expressly made under § 2255. . . . "); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (adopting the procedure set forth in *Adams* to address circumstances where a court is presented with a pro se motion that could be recharacterized as a § 2255 motion).

Therefore, we conclude that under the AEDPA's strict limitations, O'Ryan Castro's petition is successive. However, in the future, we urge district courts to be aware of these substantial fairness concerns and warn petitioners of the consequences of the recharacterization of their filings as § 2255 petitions.

CONCLUSION

The district court's dismissal of O'Ryan Castro's § 2255 petition is hereby affirmed. We find that O'Ryan Castro's § 2255 petition is successive.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. I would reverse the dismissal of Castro's section 2255 motion as successive and remand for consideration on the merits following the reasoning of the First Circuit's opinion in *Raineri v. United States*, 233 F. 3d 96 (1st Cir. 2000).

The decision here is in direct conflict with *Raineri*, the only case cited directly addressing a pre-AEDPA motion that was "converted" to a section 2255 motion, followed by a post-AEDPA section 2255 motion. On facts very similar to these, the *Raineri* court held that a *sua sponte* recharacterization ordinarily will not count as a first petition and remanded the case back to the district court for consideration of Raineri's section 2255 motion on the merits. *See also* cases involving post-AEDPA converted motions: *Adams v. United States*, 155 F.3d 582 (2d Cir. 1998) (movant must know of potential adverse consequences of recharacterization and be given the opportunity to withdraw motion); *United States v. Miller*, 197 F.3d 644 (3d Cir. 1999) (court must issue notice of the effect of recharacterization and offer the opportunity to withdraw motion); *United States v. Seesing*, 234 F.3d 456 (9th Cir. 2000) (movant must know consequences of recharacterization, or the purpose of aiding *pro se* petitioner is frustrated); *United States v. Kelly*, 235 F.3d 1238 (10th Cir. 2000) (following *Adams*); *Henderson v. United States*, 264 F.3d

709, 711 (7th Cir. 2001) (even though the district court converted and denied a Rule 33 motion, "we won't deem a Rule 33 (or other mislabeled motion) a section 2255 motion unless the movant has been warned about the consequences of his mistake.")

The Fifth Circuit case of *In Re Tolliver*, 97 F.3d 89 (5th Cir. 1996), involved a post-AEDPA, not a pre-AEDPA "converted" motion, in which the petitioner had received full relief on his prior motion, relief which could have been granted only upon a "conversion" to a § 2255 motion, and relief which the petitioner readily accepted.

We have found no case in which a pre-AEDPA motion that was "converted" by the court and then denied barred a second post-AEDPA § 2255 motion.

Supreme Court, U.S.
FILED
MAR 13 2003
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No. 02-6683

In The

Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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I. QUESTIONS PRESENTED FOR REVIEW

A. Does the Supreme Court of the United States have jurisdiction to review a United States Court of Appeals decision affirming a dismissal of a 28 U.S.C. § 2255 Petition as successive?

B. When a United States District Court re-characterizes a pro-se federal prisoner's first post-conviction motion as a habeas petition under 28 U.S.C. § 2255, does such re-characterization render the prisoner's subsequent attempt to file a first titled § 2255 petition a "second or successive petition" within the purview of the Antiterrorism and Effective Death Penalty Act (AEDPA)?

II. LIST OF PARTIES TO PROCEEDING IN ELEVENTH CIRCUIT COURT OF APPEALS

A. United States of America

B. Hernan O'Ryan Castro

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C. *Castro v. United States*, 154 L. Ed.2d 911, 123 S. Ct. 993 (U.S. 2003)

VI. STATEMENT OF BASIS FOR JURISDICTION

This Court granted Castro's Petition for Writ of Certiorari on January 27, 2003. 154 L.Ed.2d 911, 123 S.Ct. 993 (U.S. 2003). Specifically, Petitioner seeks review of the Opinion of the Eleventh Circuit in *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002). Jurisdiction to review the Eleventh Circuit's opinion is conferred upon this Court by 28 U.S.C. § 1254.

VII. STATUTES INVOLVED IN CASE

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28 U.S.C. § 2244

Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, 110 Stat. 1214

VIII. STATEMENT OF THE CASE

By Order dated January 27, 2003, this Court granted Hernan O'Ryan Castro's (hereinafter referenced to as "Castro") Petition for Writ of Certiorari. 154 L.Ed.2d 911, 123 S. Ct. 993 (U.S. 2003) Specifically, Castro appeals the

May 7, 2002, Opinion of the United States Court of Appeals for the Eleventh Circuit, in the case of *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002). (App. 198.) In its Opinion, the Eleventh Circuit Court of Appeals affirmed the Order of the United States District Court for the Southern District of Georgia dated April 11, 2001 (App. 182), wherein the District Court concurred with the Magistrate Judge's Report and Recommendation (Record 64), and dismissed Castro's Petition filed pursuant to Title 28 U.S.C. § 2255. Mr. Castro is currently incarcerated in Taft, California.

In an indictment returned on September 3, 1991, Castro was charged with conspiracy to distribute and to possess with intent to distribute cocaine (Count 1) and conspiracy to import cocaine (Count 2) in violation of 21 U.S.C. §§ 846 and 963. Castro was convicted on July 14, 1992, and he was sentenced to two hundred and forty months imprisonment. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994). Castro appealed his conviction and sentence, arguing that a variance existed between the evidence offered at trial and the indictment, in that the indictment alleged a single conspiracy while the evidence proved several independent conspiracies. *Taylor*, at 337. Castro also alleged that the evidence was insufficient to support his conviction and that venue was improper. *Taylor*, at 337. Castro further alleged that the trial court erred by allowing certain prejudicial testimony when a witness testified that she had known Castro in prison. *Taylor*, at 338. Finally, Castro appealed the District Court's determination of the quantity of cocaine attributable to him for purposes of sentencing. *Taylor*, at 338. On March 24, 1994, the Eleventh Circuit affirmed Castro's

conviction and sentence. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994).

On July 11, 1994, Castro filed a pro-se Motion for New Trial and Brief in Support Thereof pursuant to Federal Rule of Criminal Procedure 33, based on alleged newly discovered evidence. (App. 7.) In his Rule 33 Motion, Castro raised two issues.

First, Castro alleged that the government had violated the doctrine set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) by not disclosing the government's immunity agreement with its main witness against Castro. (App. 9.) Specifically, government witness Lynn Lowe testified against Castro at his trial. (App. 11.) She had previously entered into an immunity agreement with the government in exchange for agreeing to cooperate and assist in certain government drug investigations. (App. 12.) According to Castro, he was not made aware of this information until it was revealed during a separate trial of one of Castro's co-conspirators, after Castro had already been convicted. (App. 12.)

Next, Castro alleged in his Rule 33 Motion for New Trial that the government knowingly introduced perjured testimony by two of its witnesses. (App. 9.) Specifically, Castro alleged that Government witness Lynn Lowe testified under cross-examination at his trial that she had no involvement with drugs in the past. (App. 23.) Castro alleged that the government knew this was false testimony based on the immunity agreement Castro later learned of. (App. 23.) Castro alleged that Lowe had entered into an immunity agreement in exchange for assisting government officials in investigating drug crimes, because Lowe herself had been caught participating in drug related offenses. (App. 25.) Again, Castro alleged that he was not

made aware of the immunity agreement until after his trial, and the government had not been forthcoming with disclosure prior to Castro's trial. (App. 12.) Castro alleged that the government's failure to disclose the immunity agreement violated the doctrines set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 504 U.S. 150 (1972). (App. 9.)

In response to Castro's pro-se Rule 33 Motion for New Trial, the government stated in its brief to the District Court that it had no objection to treating Castro's Rule 33 Motion as a demand for relief under both Rule 33 and 28 U.S.C. § 2255. (App. 110.) Specifically, the government stated "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255, but inasmuch as such a motion may be filed at anytime, the government has no objection to Castro's Motion for New Trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." (App. 110.) After receiving the government's response to his Rule 33 Motion, Castro filed a pro-se reply to the government's brief. In his response, Castro argued that he had properly filed his Motion for New Trial pursuant to Rule 33. (App. 116.) Castro stated that the government's argument that the "allegations of a *Brady/Giglio* violation are more properly cognizable under a motion pursuant to 28 U.S.C. § 2255" was incorrect. (App. 116.)

The United States District Court for the Southern District of Georgia denied Castro's Rule 33 Motion in an Order entered October 28, 1994. (App. 137.) However, the Order did more than simply deny the Rule 33 Motion. The Order stated: "in the government's response, the government asserts that it has no objection to defendant's Motion for New Trial being treated as demanding relief under

both Rule 33 and 28 U.S.C. § 2255. Accordingly, the Court will consider defendant's motion as requesting both kinds of relief." (App. 139, 140.) Therefore, in denying Castro's Rule 33 Motion, the District Court considered Castro's Motion as requesting relief under both Rule 33 and 28 U.S.C. § 2255.

Castro appealed the denial of his self-titled Rule 33 Motion to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the District Court's denial of Castro's motion. In its Opinion, the Court of Appeals stated that the appeal arose "from the denial of relief in regard to a combined Motion to Vacate, Set Aside or Correct Sentence, 28 U.S.C. § 2255 and Motion for New Trial, Federal Rule of Criminal Procedure 33." (App. 147.)

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended 28 U.S.C. § 2255 by barring Federal habeas petitioners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances. On April 22, 1997, Castro, acting pro-se, filed his first titled 28 U.S.C. § 2255 petition. (App. 148.) On the "form motion" which Castro was required to complete, he was asked if he had "previously filed any petitions, applications, or motions with respect to this judgment in federal court?" Castro responded by stating that he had previously filed a motion pursuant to the Federal Rule of Criminal Procedure Rule 33. (App. 151.) Castro's first titled 28 U.S.C. § 2255 petition, alleged, among other things, that he was rendered ineffective assistance of counsel in violation of the Sixth Amendment for various errors made by his trial counsel. (App. 154.)

The Government responded to Castro's § 2255 petition and argued that the petition was successive and should be

dismissed as a second § 2255 petition. (Record 20.) Castro filed a "Traverse to the Government's Response to his § 2255 Motion." (Record 21.) In his response, Castro argued once again that his Titled § 2255 Petition was his first habeas filing. (Record 21.) On April 13, 1998, the District Court adopted the Report and Recommendation of the Magistrate Judge and denied Castro's § 2255 Petition. (Record 29.) There was no mention by the District Court regarding Castro's § 2255 Petition being successive.

The Eleventh Circuit Court of Appeals granted Castro's Motion for Certificate of Appealability on the issue of whether counsel was ineffective by not adequately arguing to suppress Castro's post-arrest statements. In its Order of June 13, 2000, the Eleventh Circuit Court of Appeals found that the district court had not applied Sixth Amendment analysis in deciding whether or not Castro's trial counsel was ineffective in failing to move to suppress statements Castro made after his arrest. (App. 172.) Therefore, the Eleventh Circuit vacated the decision of the district court and remanded with instructions to the district court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim, and examine the record to determine if the petition is successive. (App. 172.) Also, the Eleventh Circuit suggested that the district court hold an evidentiary hearing with regard to the post-arrest statements and suggested that the appointment of counsel for Castro would assist the court. (App. 172.)

On September 13, 2000, before the evidentiary hearing was held, the Government filed a Motion to Dismiss Castro's petition as successive pursuant to 28 U.S.C. § 2255. (Record 44.) The Government acknowledged in its Motion to Dismiss that on July 14, 1994, Castro had filed a

Motion for New Trial based on newly discovered evidence. (Record 44.) However, the Government argued that because the district court grounded its holding also under § 2255, and because the Eleventh Circuit termed Castro's pleading as a combined 28 U.S.C. § 2255 Petition and Rule 33 Motion for New Trial, Castro's first self-titled § 2255 Petition was successive, and should be dismissed pursuant to AEDPA. (Record 44.)

An evidentiary hearing was held on September 29, 2000, in the United States Magistrate Court. The proceedings of the Magistrate hearing are not part of this appeal, as on January 30, 2001, the Magistrate Court Judge issued a Report and Recommendation granting the Government's Motion to Dismiss Castro's 28 U.S.C. § 2255 Petition as successive. (App. 175.) The substance of Castro's Petition and the issues raised at the evidentiary hearing were not ruled upon. Thereafter, on April 11, 2001, the District Court adopted the Report and Recommendation of the Magistrate Court and dismissed Castro's Petition. (App. 182.) On April 25, 2001, the District Court granted a Certificate of Appealability with respect to the issue of whether the 28 U.S.C. § 2255 petition filed by Castro is a successive petition. (App. 186.)

After receiving briefs from Castro and from the United States, the United States Court of Appeals for the Eleventh Circuit entered an Opinion on January 2, 2002, in favor of Castro. (App. 188.) In its Opinion of January 2, 2002, the Eleventh Circuit held "a district court's re-characterization of a Petitioner's initial post-conviction motion will not be considered a first habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such re-characterization." (App. 197.)

The Eleventh Circuit found in its January 2, 2002, Opinion that "Castro's original Rule 33 Motion for New Trial asserted a cognizable ground for relief and that it was based upon alleged new evidence which Rule 33 explicitly provides as a basis for bringing such a motion." (App. 196.) The Court held that it was inconceivable that Castro or any other pro-se litigant could have foreseen the ultimate consequences of the district court's re-characterization of his Rule 33 Motion. (App. 196.) The Eleventh Circuit recognized the unfairness inherent in re-characterizing the Rule 33 Motion and held that the re-characterization would not count as a first habeas petition. (App. 197.) Therefore, the Court found that Castro's current § 2255 Petition is not successive and remanded the case to the District Court to consider the merits of the petition. (App. 197.)

Thereafter, mandate never issued as required by Rule 41 of the Federal Rules of Appellate Procedure and on May 7, 2002, surprisingly, the Eleventh Circuit vacated its Opinion of January 2, 2002, and substituted a completely opposite Opinion. (App. 198.) No Petition for Rehearing was ever filed by the government. Specifically, the Eleventh Circuit held in its Opinion dated May 7, 2002, that Castro's § 2255 Petition is successive. In support of its one hundred and eighty degree change in opinion, the Eleventh Circuit held that to allow Castro to file his current § 2255 petition "might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions." Therefore, the Eleventh Circuit disagreed with the First Circuit's Opinion in *Raineri v. United States*, 233 F.3d 96, 99 (1st Cir. 2000). Instead, the court stated that "in future cases where the motioner is not filing a second motion, but rather is asking to withdraw his motion or include additional

claims after a district court has decided to re-characterize the initial motion as a § 2255 motion, we would agree with a clear majority of the circuits that the district courts should warn prisoners of the consequences of re-characterization and provide them with the opportunity to amend or dismiss their filings." (App. 205.) The same panel which entered the January 2, 2002, Opinion entered the May 7, 2002, Opinion. The Honorable Judge Roney dissented to the May 7, 2002, Opinion.

On May 24, 2002, Castro filed a Petition for Rehearing En Banc with the Eleventh Circuit. On July 5, 2002, the Eleventh Circuit issued an Order denying Castro's Petition for Rehearing. On July 15, 2002, the Eleventh Circuit entered a judgment and issued mandate. Finally, on July 25, 2002, the District Court ordered that the Judgment of the Eleventh Circuit be made the Judgment of the District Court and Castro's first self-titled habeas petition was dismissed and never ruled upon. (Record 81.)

IX. SUMMARY OF THE ARGUMENT

A. Jurisdiction in this Court is proper

This Court has jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of Castro's § 2255 Petition as successive. AEDPA, enacted in 1996, amended 28 U.S.C. § 2255. The amendment basically prevents federal prisoners such as Castro from filing more than one habeas petition. Furthermore, if a petitioner files a second or "successive" petition, that petition must be certified by the Court of Appeals before it may be heard pursuant to 28 U.S.C. § 2244. A decision of the Court of Appeals not to certify a second petition may not be appealed to the

Supreme Court. 28 U.S.C. § 2244(3)(e). However, the appeal in this case is not from a decision by the Court of Appeals not to certify a second petition. Rather, the appeal in this case is from a Court of Appeals decision labeling a first titled § 2255 petition as successive and thus *requiring* certification by the Court of Appeals before it may be ruled upon. This appeal is from an Order dismissing a habeas petition as successive and such appeal is proper pursuant to 28 U.S.C. § 2255 which allows an appeal to the Court of Appeals from the Order and 28 U.S.C. § 1254 which allows this Court to review the decision of the Court of Appeals.

B. Re-characterization of post-conviction motions does not render subsequent § 2255 petitions "successive"

First, Courts sometimes "re-characterize" pro-se motions when there is no reason to. Castro's first self-titled 28 U.S.C. § 2255 petition is not "successive" and should be ruled upon. Castro's first Rule 33 Post-conviction Motion was filed on July 11, 1994. (App. 7.) The Motion was based on newly discovered evidence. Specifically, Castro found out, after he was convicted, that one of the government's witnesses who testified against him at trial had entered into an immunity agreement with the Government in exchange for cooperation with the Government's drug investigation. (App. 11.) This information was not provided to Castro's counsel prior to his trial. Castro filed his Motion under Federal Rule of Criminal Procedure 33. Even though Castro was acting pro-se, his Rule 33 Motion was properly pled and labeled as a Rule 33 Motion for New Trial. Subsequently, at the Government's urging, the District Court and Court of Appeals "re-labeled" Castro's Motion as one pursuant to 28 U.S.C.

§ 2255 *prior* to the enactment of the AEDPA. After the enactment of AEDPA, Castro filed his first titled § 2255 petition on Sixth Amendment grounds. The Government now attempts to use the gate keeping requirements of AEDPA to prevent Castro's first § 2255 habeas petition. In essence, the Court wrongfully re-characterized Castro's Rule 33 Motion as one made pursuant to § 2255 and the Government now wishes to preclude a second post-conviction motion. However, nowhere does the law preclude the filing of a Rule 33 Motion for New Trial and a later § 2255 petition when both are procedurally proper.

Secondly, if re-characterization of Castro's pro-se Rule 33 Motion was proper, fairness concerns preclude denial of Castro's first titled § 2255 petition as successive. If pro-se petitioners are not given notice prior to having initial post-conviction motions re-characterized by district courts, then they have no way of knowing that they will never be able to file a § 2255 petition in the future. It is unfair for the district court, especially at the urgence of the government, to re-characterize these motions as § 2255 petitions, fully understanding the ramifications of the re-characterization without explaining such to the pro-se petitioner. Every Circuit Court of Appeals save the Eleventh and Fifth Circuits has noted the unfairness inherent in this practice.

X. ARGUMENT

1. Jurisdiction in this Court is Proper

In addition to the question presented in Castro's Petition for Writ of Certiorari, this Court directed the parties to brief and argue the question as to whether this Court has "jurisdiction to review the Eleventh Circuit's

decision affirming the dismissal of a § 2255 petition for Writ of Habeas Corpus as second or successive." 154 L.Ed. 2d 911, 123 S. Ct. 993 (U.S. 2003). Castro acknowledges that 28 U.S.C. § 2244(3)(e) limits certain appeals to this Court after a denial of a habeas petition. However, Castro's appeal is not one which is barred by the statute.

Castro's Motion for New Trial was filed on July 11, 1994. (App. 7.) It was not until after the enactment of AEDPA in 1996 that Castro filed his first titled 28 U.S.C. § 2255 Petition for Writ of Habeas Corpus. (App. 148.) Castro's 28 U.S.C. § 2255 Petition was filed on April 22, 1997. (App. 148.) AEDPA amended § 2255 by generally limiting a federal prisoner to one § 2255 petition. A "second or successive" petition may be filed only with the approval of the court of appeals. Specifically, Paragraph 8 of 28 U.S.C. § 2255 states:

> "A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate Court of Appeals to contain (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to the case on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C § 2244(3)(e) states that a decision by the Court of Appeals not to certify a second petition may not be appealed to the Supreme Court. However, Castro's appeal is not from a decision declining to certify a second petition. Castro is not asking this Court to review the denial of a certification by the Eleventh Circuit Court of Appeals.

Castro is appealing the Eleventh Circuit's decision which *required* certification by concluding that Castro's § 2255 petition was successive. Castro's first self-titled § 2255 petition was dismissed and never ruled upon. The statute (§ 2244(3)(e)), prevents appeals of successive petitions to this Court. Castro is asking this Court to determine whether the requirements of the statute regarding certification apply to his case because as Castro has argued, his petition is not successive.

The language of 28 U.S.C. § 2255 itself allows for Castro's appeal. 28 U.S.C. § 2255 addresses appeals from denials of habeas petitions and states "an appeal may be taken to the Court of Appeals from the order entered on the motion as from the final judgment on application for a Writ of Habeas Corpus."

In this case, Castro filed a § 2255 petition, and the district court entered an Order dismissing it as successive without ruling on the merits, and Castro appealed to the Court of Appeals. The Court of Appeals affirmed, and now Castro appeals to this Court pursuant to 28 U.S.C. § 1254. Neither AEDPA, nor the habeas statutes (§§ 2254, 2255) restrict an appeal of the denial of a § 2255 petition to this Court. The reason Castro's petition was dismissed is because the Eleventh Circuit feels it is "successive." (App. 206.) However, the reason for dismissal has nothing to do with appealability to this Court.

A. When a district court re-characterizes a pro-se federal prisoner's first post-conviction motion as a petition under 28 U.S.C. § 2255, such re-characterization should not render the prisoner's subsequent attempt to file a first titled § 2255 petition as successive for two reasons.

1. *District courts don't always get it right when they attempt to re-characterize*. For instance, the district court in Castro's case did not get it right when Castro's Rule 33 Motion for New Trial was re-characterized. Castro's first post-conviction motion filed on July 11, 1994, was procedurally proper and should never have been "re-characterized" as a § 2255 petition by the district court at the urgence of the Government. When Castro filed his pro-se Rule 33 Motion for New Trial, AEDPA had not yet been enacted. Therefore, the harm done by re-characterization of the Motion by the court as a § 2255 petition could not have been anticipated by the district court.

It is not uncommon for courts to "re-characterize" or "retitle" pro-se motions as § 2255 petitions:

> "Federal Courts have long recognized that they have an obligation to look behind the label of a motion filed by a pro-se inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990).

This accommodation is the result of the time honored practice of liberally construing pleadings of pro-se plaintiffs. *Haynes v. Kerner*, 404 U.S. 519, 520 (1972). In accordance with this practice, "district courts routinely convert post-conviction motions of prisoners who unsuccessfully

seek relief under some other provision of law into motions made under . . . § 2255 and proceed to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States*, 155 F.3d 582, 583 (2nd Cir. 1998). These conversions were justified because they were harmless and they also assisted prisoner movants in dealing with legal technicalities that might otherwise preclude prompt adjudication of their claims. *Id.* "Several Courts of Appeals have endorsed this approach as fair and efficient." *United States v. Miller*, 197 F.3d 644, 648 (3rd Cir. 1999). Therefore, both before and after the enactment of the AEDPA in 1996, it has been common practice for district courts to re-characterize motions as § 2255 petitions when the post-conviction motion is procedurally improper as pled. This may explain why the district court in Castro's case was so quick to re-characterize Castro's Rule 33 Motion for New Trial. The ramifications of re-characterization were obviously not as great prior to the enactment of AEDPA. It stands to reason that the district court in Castro's case never intended to harm Castro by re-characterizing his Rule 33 Motion for New Trial. The intent in re-characterizing motions for pro-se prisoners presumably is to *assist* the prisoner in having a claim heard which may have been filed under the wrong title. However, Castro has obviously been harmed by this practice.

The Government argues that because Castro's Rule 33 Motion was re-characterized and labeled as a § 2255 petition, his current § 2255 Petition is "successive" and should be dismissed for failure to obtain certification required by 28 U.S.C. § 2255. (Record 44.) However, rather than looking at how the court, at the Government's urging, "labeled" Castro's 1994 pleading, the substance of

the pleading must be examined to determine if the pleading was procedurally proper as a Rule 33 Motion for New Trial. If so, the current § 2255 petition is the first and the dismissal of it as successive is improper.

The United States Court of Appeals for the Second Circuit certainly recognizes this dilemma.

> "If a District Court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as a "second" 2255. Thus, a conversion, initially justified because it harmlessly assisted the prisoner/movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well justified grievance adjudicated. The Court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights. A prisoner convicted pursuant to unconstitutional proceedings might lose the right to have a single petition for habeas corpus adjudicated, solely by reason of a district court having incorrectly re-characterized some prior motion as one brought under § 2255. **We do not suggest it would be appropriate for a later court to deem the earlier motion as one filed under § 2255 solely because the earlier court so labeled it. We ruled in *Chambers v. United States*, 106 F.3d 472, 474-475 (2nd Cir. 1997) that whether a motion was made under § 2255 should be determined by reference to the relief sought in the motion rather than what label the movant used. We think this would be so for labels applied by the Court as well, at least where an application that is not a § 2255 motion is erroneously deemed to be one.**" *Adams v. United States*, 155 F.3d 582, 583-584 (2nd Cir. 1998) *emphasis added.*

Therefore, re-characterization by a district court of a post-conviction motion as a § 2255 petition should not preclude a first titled § 2255 petition because sometimes a district court's re-characterizations are simply wrong. Castro's Rule 33 Motion for New Trial was erroneously deemed to be a § 2255 petition. Again, no law suggests that it is improper for a petitioner to file a Rule 33 Motion for New Trial and a § 2255 petition in the same case. Interestingly enough, throughout the procedural history of this appeal, the Government has never cited any law as to why Castro's initial Rule 33 Motion for New Trial was improperly pled. It simply wasn't.

Again, in his Rule 33 Motion for New Trial, Castro argued that he had discovered new evidence to suggest that the Government had violated the *Brady* doctrine by not disclosing the Government's agreement with one of its main witnesses against Castro. (App. 9.) Castro also argued that the Government knowingly introduced perjured testimony when it allowed the same witness to testify that she had no involvement with drugs in the past. (App. 9.) Castro alleged that the Government knew this was false testimony at Castro's trial based on the immunity agreement of which Castro later learned. (App. 9.) Castro was not made aware of the immunity agreement until after his trial because the Government had not disclosed it prior to Castro's trial. (App. 12.)

Castro's Rule 33 Motion for New Trial was proper and should have never been re-characterized. Federal Rule of Criminal Procedure Rule 33 states that it is a proper tool

to use for filing motions based on newly discovered evidence. Castro's Motion was based on newly discovered evidence and it should have never been re-characterized because it was procedurally proper. This Court has considered Rule 33 Motions for New Trial based on *Brady* violations before. Specifically, in *Giglio v. United States*, 405 U.S. 150, 151 (1972) the defendant filed a Motion for New Trial following his conviction. The Defendant had discovered that the prosecution had secretly promised a witness that he would not be prosecuted if he testified. This Court considered the Defendant's Motion for New Trial and determined that due process concerns required a new trial and reversed the judgment of conviction. *Giglio*, at 155.

Again, in *United States v. Agurs*, 427 U.S. 97, 100 (1976), the Defendant filed a Rule 33 Motion for New Trial in the Court of Appeals based on newly discovered evidence of an alleged *Brady* violation. This Court decided the Defendant's *Brady* claims on the merits pursuant to the Motion for New Trial. *Id*.

In *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000), the First Circuit considered the defendant's Motion for New Trial. *Josleyn*, at 148. The Motion for New Trial alleged *Brady* violations and the merits of the allegations were considered.

The Sixth Circuit in *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997) held that an alleged *Brady* violation could be properly heard in a Rule 33 Motion for New Trial. In *United States v. Espinoza-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990), the court stated that the defendant's Motion for New Trial under Federal Rule of Criminal Procedure 33 should be granted due to the Government's failure to disclose evidence that could have

been used to impeach a Government witness. Also, in *United States v. Runyan*, 290 F.3d 223 (5th Cir. 2002), the court cited well established law holding that when a Rule 33 Motion for New Trial based on newly discovered evidence raises a *Brady* violation, an appellate court should apply the three prong Brady test to determine whether a new trial is appropriate. *Runyan*, at 245.

This Court and the Circuit Courts of Appeals have long recognized that it is proper for Defendants to file Motions for New Trial based on newly discovered evidence in order to raise alleged *Brady* violations. In fact, the Eleventh Circuit recognized this fact in its first *Castro* decision filed January 2, 2002. (App. 188.) Specifically, the Eleventh Circuit stated " . . . Castro's Rule 33 motion for a new trial asserted a cognizable ground for relief. The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion." (App. 196.) There was nothing wrong with Castro's initial Rule 33 Motion for New Trial and it was improperly re-characterized. The district court's actions in Castro's case illustrates that courts don't always get it right when attempting to re-characterize first post-conviction motions. Sometimes, there is no need for re-characterization, but it is done anyway. This creates obvious problems under AEDPA. Courts should not be given free reign to re-characterize post-conviction motions and then use AEDPA to prevent habeas petitions. Castro does not argue that there is anything wrong with re-characterizing pro-se post-conviction motions in an attempt to help pro-se petitioners. However, as has been shown in Castro's case, re-characterization is not always necessary when done and

when a post-conviction motion is proper as pled, to unilaterally re-characterize it and prevent a later habeas petition is inherently unfair.

B. Even when it is procedurally proper for district courts to re-characterize post-conviction motions as § 2255 petitions, fairness concerns require notice to the pro-se petitioner of the ramifications of such re-characterization.

Again, as Castro argued in his Petition for Writ of Certiorari, every circuit court of appeals has considered this issue. Every circuit other than the Eleventh and Fifth Circuits have decided that unless a pro-se petitioner is provided with notice of the consequences of re-characterization, a first post-conviction motion which is re-characterized by the court will not count as a "first" habeas petition for purposes of the AEDPA. Each of the seminal cases in each circuit was discussed in Castro's Petition for Writ of Certiorari. Further research of the cited cases indicates that since Castro's petition was filed, the positions of the circuits have not changed on this issue. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits recognize the fact that it is unfair for a court to re-characterize a post-conviction motion, without the approval of the author, and to later deny a first titled habeas petition as "successive." The Fifth and Eleventh Circuits do not recognize this fact. The only disagreement among the majority circuits is in which mechanism to apply to ensure that petitioners' first titled habeas petitions are heard and ruled upon.

As the D.C. Circuit stated,

> "District Courts should not re-characterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such re-characterization, agrees to have the motion so re-characterized, or (b) the Court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than to have it so re-characterized. *Adams v. United States*, 155 F.3d 582, 584 (2nd Cir. 1998), see also *U.S. v. Emanuel*, 288 F.3d 644, 649 (4th Cir. 2002) (adopting informed consent/notice approach similar to *Adams*); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2001) (same); *U.S. v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000) (same); *U.S. v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1998) (adopting expanded notice approach)." *U.S. v. Palmer*, 296 F.3d 1135, 1145 (D.C. Cir. 2002).

The First and Seventh Circuits do not require the protocol mentioned, but rather simply refuse to count a re-characterized motion as a "first" habeas motion sufficient to trigger AEDPA's gate keeping requirements if a district court converts a post-conviction motion into a § 2255 petition without notice and an opportunity to be heard. *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000), *Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001). Either way, the majority of the circuits realize that the purpose of the AEDPA may be maintained while at the same time being fair to pro-se litigants.

There are many reasons why the decisions in *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002) and *In Re: Toliver v. United States*, 97 F.3d 89 (5th Cir. 1996) are unfair and why re-characterized motions should not count as "first" motions under AEDPA.

First, if the true reason for re-characterizing initial post-conviction motions in the first place is to benefit the pro-se petitioner, then the *Castro* and *Toliver* decisions make no sense.

> "Before the AEDPA, District Courts received various and sundry post-conviction motions from prisoners, examined their substance and the relief sought, and, when appropriate, routinely treated certain of them as having been made pursuant to § 2255, regardless of the label the prisoner gave the motion or the fact that no label was given at all. A number of circuits, ours included, approved this practice because at the time it benefitted the prisoner. See, *e.g.*, *Raines v. U.S.*, 423 F.2d 526, 528 (4th Cir. 1970). . . ." *United States v. Emanuel*, 288 F.3d 644, 647 (4th Cir. 2002).

Because these motions have historically been re-characterized in order to benefit pro-se prisoners so that legitimate claims might be heard even if improperly pled, it seems unconscionable that the same court which re-characterizes the motion would later use the AEDPA to prevent the filing of potentially valid claims. If the district court in Castro's case had never re-characterized his Rule 33 Motion for New Trial as a § 2255 petition, his current § 2255 petition would clearly be ruled upon. Therefore, if the true reason for re-characterizing Castro's Rule 33 Motion was to assist him, the rationale in the Eleventh Circuit's decision deeming Castro's § 2255 Petition successive is not

consistent with the district court's original intent. If the district court's intent behind re-characterization was to hurt Castro (or the pro-se petitioner) AEDPA should not prevent a first titled habeas petition for obvious reasons.

Next, re-characterized motions should not count as "first" petitions under AEDPA because AEDPA does not define what constitutes a "successive" or "second" motion. For example, Castro's Rule 33 Motion was obviously re-characterized. However, if a different petitioner in the Eleventh Circuit were to file the same Rule 33 Motion raising the exact same issues, the district court would not have to re-characterize it and it may not be re-characterized, and therefore, a first self-titled § 2255 petition filed later would not be deemed "successive." Because there is no rule requiring re-characterization of a Rule 33 Motion for New Trial as a § 2255 petition, the decision to re-characterize precludes Castro's Petition, but the other theoretical petitioner would be allowed to have his or her § 2255 petition ruled upon. In essence, the Eleventh Circuit will not allow the district court to consider Castro's first titled § 2255 petition, but it would allow the district court to consider the theoretical petitioner's § 2255 petition simply because the district court chose not to re-characterize the theoretical petitioner's first post-conviction motion, for whatever reason.

Nowhere does the AEDPA define what constitutes a § 2255 petition. The AEDPA simply states that a petitioner cannot file more than one § 2255 petition without certification from the Court of Appeals. The district courts of the Eleventh and Fifth Circuits should not be able to unilaterally declare any post-conviction motion to be a § 2255 petition without giving notice to the petitioner or the opportunity to withdraw the motion. Allowing the Eleventh and Fifth

Circuits to do so goes beyond the purpose of AEDPA. The purpose of AEDPA is to prevent successive habeas petitions, not to prevent more than one post-conviction motion of any type.

Finally, re-characterized post-conviction motions should not count as "first" petitions under AEDPA because it is simply unfair to pro-se petitioners. In *Haynes v. Kerner*, 404 U.S. 519, 520 (1972) this Court held that pro-se pleadings are held to less stringent standards than those drafted by attorneys. Therefore, this Court has recognized the fact that pro-se parties cannot be expected to understand the nuances of laws such as AEDPA. The Eleventh Circuit's opinion on this issue is at odds with every other Circuit except the Fifth. The majority circuits address the fairness concerns, as did Castro in his Petition for Writ of Certiorari to this Court. The basic premise of those majority circuits on this issue is that it is unfair for a district court to re-characterize a pro-se petitioner's post-conviction motion as a § 2255 petition without giving the petitioner notice of the potential adverse consequences of such re-characterization or an opportunity to withdraw the petition. *Adams v. United States*, 155 F.3d 582, 583 (2nd Cir. 1998). This is especially true for petitioners such as Castro, who filed their first post-conviction motions *before* enactment of AEDPA. There was no way possible for Castro to have known of the ramifications of the re-characterization of his Rule 33 Motion for New Trial. Other arguments in support of pro-se petitioners in this regard are discussed in the recently published and well written comment *One Bite at the Apple: The Effect of Re-characterization on Post-Conviction Relief Under 28 U.S.C. § 2255"* 75 Temple L. Rev. 613 (2002).

Again, the majority circuits seem split on how to implement the fairness concerns inherent in re-characterization. Castro proposes that the procedure implemented by the Third Circuit in *United States v. Miller*, 197 F.3d, 644, 652 (3rd Cir. 1999) be adopted by this Court. In *Miller*, the Court held that before re-characterizing post-conviction motions, the district courts should inform the inmate that he may choose to: (1) have his motion ruled upon as filed; (2) have his motion re-characterized as a § 2255 motion and heard as such but lose his ability to file successive petitions absent certification by the Court of Appeals or (3) withdraw the motion and file one all inclusive § 2255 Petition within the one year statutory period. *Miller*, at 652. Other Circuits address concerns that such notice requirements will burden the district courts with protocol requirements. *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000). However, it would seem that the only new burden imposed upon a district court would be to simply send a form notice to an inmate prior to re-characterizing the inmate's post-conviction motion. The small burden placed on the district courts seems minuscule in comparison to the possibility that petitioners may be deprived of their right to have their habeas petitions ruled upon.

CONCLUSION

When Hernan O'Ryan Castro filed his pro-se Rule 33 Motion for New Trial in 1994 based on newly discovered evidence, he had no idea that such a filing would later preclude the filing of a habeas petition pursuant to 28 U.S.C. § 2255. Many federal prisoners convicted in the Fifth and Eleventh Circuits may be in similar situations.

As has been argued, it is entirely possible for a federal prisoner in the Fifth or Eleventh Circuits to be prevented from ever filing a § 2255 petition due to improper re-characterization of post-conviction motions.

Re-characterization of pro-se post-conviction motions by district courts has always been a noble act. It is right for district courts to hear legitimate claims which may be precluded simply because they are "titled" or "pled" improperly by unknowing prisoners. District courts should continue this practice as it benefits no one to dismiss legitimate claims simply because the claim may be pled improperly.

However, with the enactment of AEDPA, district courts should simply be more careful when re-characterizing post-conviction motions. Castro asks that he and other prisoners be given notice and an opportunity to withdraw or amend those motions which district courts feel compelled to re-characterize. When such notice is not given and motions are re-characterized, prisoners may lose legitimate claims due to the gate keeping requirements of AEDPA. It is not far fetched to suggest that there may be prisoners in the Fifth or Eleventh Circuits either now or in the future who are in custody as the result of a violation of their constitutional rights and who cannot attack such violations because of the decisions in *Toliver* and *Castro*. The purpose of AEDPA was to prevent successive habeas petitions, not to prevent habeas petitions all together.

Castro requests that this Honorable Court reverse the opinion of the Eleventh Circuit and implement the policy adopted by the Third Circuit in *United States v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1999). Specifically, Castro asks that this Court issue a holding requiring that before

re-characterizing post-conviction motions, district courts must inform the inmate that he may choose to: (1) have his or her motion ruled upon as filed; (2) have his or her motion re-characterized as a § 2255 petition and heard as such, but lose his or her ability to file successive petitions absent certification by the Court of Appeals, or (3) withdraw the motion and file one all inclusive § 2255 petition within the one year statutory period.

Respectfully submitted,

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JUN 1 1 2003

No. 02-6683

In the Supreme Court of the United States

HERNAN O'RYAN CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the court of appeals' decision affirming the dismissal of a motion for collateral relief under 28 U.S.C. 2255 as second or successive.

2. Whether, after petitioner's initial post-conviction motion was recharacterized as a motion under 28 U.S.C. 2255, the district court correctly dismissed petitioner's subsequent Section 2255 motion as second or successive.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 198-208) is reported at 290 F.3d 1270.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2002. The petition for a writ of certiorari was filed on October 1, 2002, and granted on January 27, 2003. In addition to the question presented by the petition, the Court ordered the parties to address whether it has jurisdiction to review the court of appeals' decision. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), but is lacking under 28 U.S.C. 2244(b)(3)(E), as explained *infra*.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Section 2255 of Title 28 of the United States Code authorizes a federal prisoner to file a collateral attack on his conviction and sentence. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, amended Section 2255 in a number of ways, including by imposing stricter limitations on the filing of second or successive motions. Section 2255 now provides, in paragraph 8, that a second or successive motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals" to contain either (1) newly discovered evidence that, when viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the prisoner guilty or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Under subsection (b)(2) of Section 2244, a state prisoner seeking to file a second or successive habeas corpus application under 28 U.S.C. 2254, like a federal prisoner seeking to file a second or successive motion under 28 U.S.C. 2255, must show that the application relies either on a new rule of constitutional law that applies retroactively or on new evidence that establishes his innocence. Subsection (b)(3) of Section 2244 provides that, before a state prisoner may file a second or successive habeas corpus application, the applicant "shall move in the appropriate court of appeals for an order authorizing the district court to consider the

application," 28 U.S.C. 2244(b)(3)(A); that such a motion "shall be determined by a three-judge panel of the court of appeals," 28 U.S.C. 2244(b)(3)(B); that a second or successive application may be authorized by the panel "only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. 2244(b)(3)(C); and that the panel must grant or deny authorization to file a second or successive application "not later than 30 days after the filing of the motion," 28 U.S.C. 2244(b)(3)(D). The final paragraph of Section 2244(b)(3), paragraph (E), provides that the panel's "grant or denial of an authorization * * * to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

2. In 1992, following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiracy to possess with the intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846, and conspiracy to import cocaine, in violation of 21 U.S.C. 963. J.A. 3. He was sentenced to 240 months' imprisonment. J.A. 5. The court of appeals affirmed, 17 F.3d 333 (11th Cir. 1994), and this Court denied certiorari, 513 U.S. 950 (1994).

3. On July 11, 1994, petitioner filed a *pro se* motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. J.A. 7-104.[1] He argued, among other

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[1] The version of Rule 33 then in effect provided as follows:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant

things, that an immunity agreement that a government witness had entered into with another United States Attorney's Office several years before his trial constituted newly discovered evidence that the government failed to disclose in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). J.A. 13-26. In its response to the motion, the government stated that petitioner's allegation of a "*Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255," but that it had "no objection to [petitioner's] motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. § 2255." J.A. 110. The government went on to argue that disclosure of the immunity agreement, which the prosecutor in petitioner's case had not known about at the time of petitioner's trial, would not have affected the trial's outcome, J.A. 109-113, and that petitioner was therefore not entitled to relief "[w]hether his motion is considered under Rule 33, Fed. R. Crim. P. or treated as though filed pursuant to 28 U.S.C. § 2255," J.A. 114. In his reply to the government's response, petitioner argued that his motion was properly filed under Rule 33, because, in his view, a motion under Section 2255 must be based on a defect on the face of the record. In contrast, he stated, when "a motion is based upon some extrinsic defect which does not appear on the face of the record or pleadings, the

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the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty [sic] or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1994).

proper means of attack is a motion for a new trial." J.A. 116.[2]

On October 28, 1994, the district court denied the motion. J.A. 137-146. The court noted that the government had no objection to the motion's "being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255," and stated that it would therefore "consider [petitioner's] motion as requesting both kinds of relief." J.A. 139-140. Addressing petitioner's claim that the government had improperly failed to disclose the immunity agreement, the court concluded that, because the agreement would have had minimal impeachment value, there was no reasonable probability that disclosure of the agreement would have changed the outcome of the trial. J.A. 141-142.

In his appeal, petitioner challenged the district court's denial of his motion and its refusal to hold an evidentiary hearing, but he did not challenge the district court's decision to treat the motion as one brought under both Rule 33 and Section 2255. See 94-9270 Pet. C.A. Br. 10-41; 94-9270 Pet. C.A. Reply Br. 5-21. On March 19, 1996, the court of appeals affirmed in an unpublished per curiam order. J.A. 147. After observing that petitioner's appeal was "from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," the court stated that

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[2] In fact, Section 2255 motions may, and often are, based on new evidence that is not contained in the existing record. See Rules 4, 6, 7, and 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts. See also *Massaro* v. *United States*, 123 S. Ct. 1690, 1694 (2003) (ineffective assistance of counsel); *United States* v. *Bagley*, 473 U.S. 667, 671-672 (1985) (*Brady* claim raised in motion under 28 U.S.C. 2255).

it was affirming "for the reasons set forth * * * [by] the district court." J.A. 147.

4. On April 22, 1997, petitioner filed a motion under 28 U.S.C. 2255. J.A. 148-161. The motion repeated the claims made in the earlier motion and added several others, including a claim that his trial counsel had rendered ineffective assistance by failing to file a motion to suppress statements on the grounds that they were taken in violation of his Sixth Amendment right to counsel and were involuntary. J.A. 154. In its response, the government argued, among other things, that petitioner's Section 2255 motion was a successive motion that should be dismissed under the abuse of the writ doctrine and AEDPA's gatekeeping provisions. Gov't Resp. in Opp. to Pet. Successive Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence 10-12. The district court denied the Section 2255 motion without addressing whether it was successive. J.A. 162-164.

After granting petitioner a certificate of appealability on the claim that challenged counsel's failure to file a suppression motion, J.A. 165-166, the court of appeals vacated the district court's order denying the Section 2255 motion and remanded for further proceedings, J.A. 167-172. The court of appeals found that the district court had apparently "examined the facts only in reference to the Fifth Amendment law," instead of applying a "Sixth Amendment analysis"; it noted that an evidentiary hearing "would have facilitated the determination of voluntariness," and that the appointment of counsel "would assist the court"; and it raised the "question of whether this petition is successive." J.A. 172. The court therefore directed the district court on remand to "employ Sixth Amendment analysis, develop more fully the facts surrounding [petitioner's] claim and examine

the record to determine if this petition is successive." *Ibid.*

5. After the remand, the government moved to dismiss petitioner's Section 2255 motion. Because petitioner's 1994 motion for a new trial had been treated as a Section 2255 motion, the government argued, his current motion was a second or successive motion that had not been authorized by the court of appeals, as AEDPA requires, and the court was therefore required to dismiss it. Gov't Mot. to Dismiss Castro's Successive Pet. Pursuant to 28 U.S.C. § 2255, at 3-5. A magistrate judge agreed with the government and recommended that the motion be dismissed. J.A. 175-181.

Adopting the magistrate judge's report and recommendation, the district court ruled that petitioner's Section 2255 motion was successive. J.A. 182-185. The court rejected petitioner's claim that his new trial motion should not have been recharacterized without giving him notice of the potential consequences under AEDPA and an opportunity to amend or withdraw the motion. J.A. 182-183. The court found that the government's response to the new trial motion had put petitioner on notice that it might be characterized as a Section 2255 motion; that petitioner had never objected to the recharacterization; and that pre-AEDPA "common law precedent" imposed "the same restrictions on successive petitions" as those imposed by AEDPA. J.A. 183-184. The district court thus concluded that dismissal was appropriate because petitioner "may have known of the consequences of having his motion for a new trial construed as a § 2255 motion and was put on notice of said re-characterization." J.A. 184. The district court nevertheless granted a certificate of appealability on the issue of successiveness. J.A. 186-187.

6. The court of appeals initially vacated the district court's dismissal of petitioner's Section 2255 motion, holding that the motion could not be deemed successive. J.A. 188-197. Acting *sua sponte*, however, and with one judge dissenting, the court of appeals subsequently withdrew its original opinion and substituted an opinion that affirmed the district court's judgment. J.A. 198-208.

In holding that petitioner's Section 2255 motion was successive, the court reasoned that "reliev[ing] an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized * * * might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions," and that a court should not create such an exception "[w]ithout being given any additional instruction by Congress." J.A. 204. Because petitioner's Section 2255 motion was successive, and because it did not "contain newly discovered evidence" or "address a new rule of constitutional law," the court held that it failed to satisfy AEDPA's requirements. J.A. 203. The court stated, however, that it shared the "substantial fairness concerns" of the other courts of appeals that had addressed the issue of successiveness in cases in which the first motion had been recharacterized, J.A. 203, 206, and it urged district courts in future cases to "warn petitioners of the consequences of recharacterizing their motions as § 2255 petitions" and to "provide them with the opportunity to amend or dismiss their filings," J.A. 203, 205.

Judge Roney dissented. J.A. 207-208. In his view, the court should have followed the cases from other courts of appeals holding that a recharacterized post-conviction motion ordinarily will not count as a first

Section 2255 motion for purposes of AEDPA's limitation on second or successive motions. *Ibid.*

SUMMARY OF ARGUMENT

I. Title 28 U.S.C. 2244(b)(3)(E) provides that "[t]he * * * denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari." Under that provision, this Court lacks jurisdiction to review the court of appeals' decision in this case.

As an initial matter, Section 2244(b)(3)(E) applies to Section 2255 motions. Paragraph 8 of Section 2255 requires that a second or successive motion be certified by a court of appeals panel "as provided in section 2244," which establishes several substantive and procedural requirements for the filing of habeas corpus applications by state prisoners. The natural reading of this language is that a motion for authorization to file a second or successive Section 2255 motion is to be governed by the procedural rules set forth in Section 2244, one of which is the rule of finality in Section 2244(b)(3)(E) for the "denial" of such authorization.

The "denial of an authorization * * * to file a second or successive [motion]" encompasses two subsidiary determinations: that the motion is second or successive, and that the prisoner has not made a prima facie showing that the gatekeeping requirements have been satisfied. If Congress had intended to deprive this Court of jurisdiction to review only the latter determination, it could have used narrower language, as it did in Section 2244(b)(3)(C), which speaks of the gatekeeping requirements alone. This interpretation is consistent with *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), which holds that Section 2244(b)(3)(E) does not withhold jurisdiction to review a court of appeals'

determination that an application is *not* second or successive. This Court has jurisdiction in such a case because there has been no "grant or denial of an authorization * * * to file a second or successive application." When there is such a denial, further appellate review is barred.

Finally, while it might be argued that Section 2244(b)(3)(E) applies only when the court of appeals' determinations are made in denying a motion for authorization to file a second or successive Section 2255 motion, the better view is that the jurisdictional limitation also applies when those determinations are made in deciding an appeal from the dismissal of a motion. Section 2244(b)(3)(E), by its terms, applies to the denial of authorization to file a second or successive application, and such authorization can be denied in deciding an appeal. Moreover, a prisoner is ordinarily able to challenge a district court's determination that his Section 2255 motion is second or successive either by appeal or by motion, and it would be odd if this Court's jurisdiction depended on how the case arrived at the court of appeals.

II. If this Court determines that it has jurisdiction, it should affirm the decision of the court of appeals. Petitioner contends that the district court erred in treating his first post-conviction motion as one filed under 28 U.S.C. 2255, but he did not raise that claim when he appealed the district court's denial of the motion. The district court's characterization of petitioner's first motion was therefore the law of the case when he filed his second one.

When an issue is decided by a district court, the losing party challenges the decision on appeal, and the court of appeals rules against him, the court of appeals' decision is the law of the case, and binds the parties at

subsequent stages of the litigation. When an issue is decided by a district court and the losing party does *not* challenge the decision on appeal, the decision of the *district court* becomes the law of the case. The two situations are treated identically because it would make little sense for a party that does not raise a claim to be in a better position than a party that does raise the claim and loses.

Requiring parties to raise claims at the earliest opportunity reduces the need for subsequent appeals, and thereby promotes judicial efficiency. It also promotes finality, an interest that is particularly compelling in the context of post-conviction proceedings. Principles of waiver and forfeiture are fundamental features of the procedural rules that govern such proceedings, see, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467 (1991) (abuse of the writ); *United States* v. *Frady*, 456 U.S. 152 (1982) (procedural default), and these principles should govern challenges to the characterization of a post-conviction motion. While it is true that petitioner filed his first post-conviction motion before AEDPA was enacted, there is no unfairness in holding him accountable for his failure to challenge the characterization of his motion in the appeal from its denial, because second or successive Section 2255 motions were severely limited by abuse of the writ principles even before AEDPA. See *McCleskey*, *supra*.

Petitioner contends that a post-conviction motion should not be treated as a Section 2255 motion unless the district court gave the prisoner notice of its intention to do so and an opportunity to amend or withdraw the motion. Both the decision on which petitioner relies for that proposition, *Adams* v. *United States*, 155 F.3d 582 (2d Cir. 1998), and the majority of the decisions that follow it are consistent with law of the case principles,

because the prisoner in those cases challenged the characterization of his post-conviction motion in an appeal from the denial of the motion, not when he filed a subsequent one.

Principles of law of the case, waiver, and forfeiture will not be applicable to characterization decisions in cases in which the prisoner has challenged the decision at the earliest opportunity. See, *e.g.*, *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594 (2002) (dismissing writ of certiorari as improvidently granted). If the Court again grants certiorari in such a case, it will be necessary to develop standards for determining when a post-conviction motion is to be treated as a Section 2255 motion. But it is not necessary to do so here. This case should be decided on the ground that a characterization decision must be challenged at the time it is made.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE COURT OF APPEALS' DECISION AFFIRMING THE DISMISSAL OF PETITIONER'S SECTION 2255 MOTION AS SECOND OR SUCCESSIVE

The district court dismissed petitioner's Section 2255 motion as second or successive and the court of appeals affirmed. Petitioner asks this Court to reverse the decision of the court of appeals. The threshold issue is whether 28 U.S.C. 2244(b)(3)(E), which provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari," deprives this Court of jurisdiction to consider petitioner's request. Whether it does depends on the answers to three questions. The first question is whether Section 2244(b)(3)(E) applies to a federal prisoner's motion under Section 2255. The second

question is whether Section 2244(b)(3)(E) applies both to a court of appeals' determination that AEDPA's gatekeeping requirements have not been satisfied and to its antecedent determination that the motion is second or successive. The third question is whether Section 2244(b)(3)(E) applies when the court of appeals makes these determinations in affirming the dismissal of a Section 2255 motion as second or successive. As explained below, the answer to each of these questions is yes. The Court therefore lacks jurisdiction to review the court of appeals' decision.

A. Section 2244(b)(3)(E) Applies To A Section 2255 Motion

Under paragraph 8 of 28 U.S.C. 2255, a second or successive motion by a federal prisoner must be certified by a court of appeals panel "as provided in section 2244" to contain either new evidence that establishes the defendant's innocence or a new rule of constitutional law that applies retroactively. Subsection (b)(2) of Section 2244 imposes similar gatekeeping requirements on state prisoners seeking to file a second or successive application under Section 2254. Subsection (b)(3) of Section 2244 establishes the procedural rules for obtaining authorization to file a second or successive Section 2254 application, including the prohibition against challenging the grant or denial of authorization by appeal, petition for rehearing, or petition for a writ of certiorari, 28 U.S.C. 2244(b)(3)(E).[3]

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[3] The other procedural requirements are the following: subsection (b)(3)(A) requires that an order authorizing a second or successive application be sought from the court of appeals; subsection (b)(3)(B) requires that a motion for such an order be determined by a three-judge panel; subsection (b)(3)(C) prohibits the court of appeals from authorizing a second or successive application unless

Petitioner apparently concedes that Section 2244(b)(3)(E)'s prohibition against certiorari review of gatekeeping determinations is incorporated in paragraph 8 of Section 2255 by virtue of that paragraph's statement that certification is to be "as provided in section 2244." See Br. 12. Petitioner's amicus, however, contends that "[i]t is not clear" that Section 2244(b)(3)(E) applies to Section 2255 motions. NACDL Br. 12 n.2. Petitioner's amicus is mistaken in that view, as every court of appeals to consider the question has found. See *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997); *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997).

The natural reading of Section 2255's requirement that a second or successive motion be certified "as provided" in Section 2244 is that such a motion is to be certified *in the manner* described in Section 2244. See *Webster's Third New International Dictionary* 125 (1993) (one meaning of "as" is "in the same way or manner"). The language in paragraph 8 of Section 2255 thus means that a motion for authorization to file a second or successive Section 2255 motion is to be governed by the procedural rules concerning certification that are set forth in Section 2244. Under this straightforward interpretation, subsection (b)(3)(E) is incorporated in Section 2255 because it is one of the procedural rules in Section 2244.

According to petitioner's amicus, Congress might have intended that Section 2244(b)(3)(E) apply to

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there has been a prima facie showing that the gatekeeping requirements in subsection (b)(2) have been satisfied; and subsection (b)(3)(D) requires the court of appeals to grant or deny authorization within 30 days of the filing of the motion.

Section 2254 applications but not to Section 2255 motions because "review on writ of certiorari of a denial of certification to file a second or successive § 2255 motion does not implicate the federalism or comity concerns implicated when federal habeas corpus review of a state court judgment is prolonged." NACDL Br. 12 n.2. But a possible reason for treating state and federal prisoners differently carries no interpretive weight when the text of the provisions treat them the same. In any event, Congress's central motivation for imposing stricter limitations on the filing of second or successive collateral motions was "respect for the finality of criminal judgments." *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998). See also H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). And "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States* v. *Frady*, 456 U.S. 152, 166 (1982).[4]

B. Section 2244(b)(3)(E) Applies To A Court Of Appeals' Determination That The Section 2255 Motion Is Second Or Successive

Under Section 2244(b)(3)(E), this Court lacks jurisdiction to review a court of appeals' "grant or denial of an authorization * * * to file a second or successive [motion]." Petitioner contends that this Court has jurisdiction because what he is asking it to review is not "the denial of [an authorization] by the Eleventh Circuit" but "the Eleventh Circuit's decision which

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[4] When Congress did wish to treat state and federal prisoners differently in the provisions of AEDPA that govern second or successive collateral challenges, it did so explicitly. Section 2244(b)(1), for example, prohibits state prisoners from raising in a second or successive Section 2254 application a claim that was raised in a prior application, but there is no such prohibition in Section 2255.

required [authorization] by concluding that [his] § 2255 petition was successive." Br. 12-13. Petitioner's amicus likewise argues that Section 2244(b)(3)(E) "eliminates certiorari jurisdiction with respect to '[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . ,' not with respect to a ruling that an application is or is not a second or successive application." NACDL Br. 11-14. Insofar as petitioner and his amicus are suggesting that the court of appeals decided only that his motion was second or successive, they are mistaken. In addition to making that determination (J.A. 200-207), the court determined that the motion did not meet the gatekeeping requirements in paragraph 8 of Section 2255 (J.A. 203). Petitioner's motion, the court said, "does not meet either of the two requirements found under the AEDPA—[it] does not contain newly discovered evidence, nor does [it] address a new rule of constitutional law." *Ibid.* The effect of the court of appeals' decision, therefore, was to deny petitioner "authorization * * * to file a second or successive [motion]." 28 U.S.C. 2244(b)(3)(E).

Insofar as petitioner is claiming that, even if the court of appeals decided more than one issue, he is seeking review only of its decision that his motion was second or successive, his petition is still barred under Section 2244(b)(3)(E). As explained below, that provision makes the certifying panel of the court of appeals the final decisionmaker, not only for the determination of whether the gatekeeping requirements have been satisfied, but also for the determination that the motion is second or successive.

1. The denial of authorization to file a second or successive motion represents a single order that encompasses two legal conclusions: that the Section 2255 motion is second or successive, and that there has been

no prima facie showing that it is based on new evidence that proves the prisoner's innocence or a new rule of constitutional law that applies retroactively. If Congress had intended to deprive this Court of jurisdiction to review only one of the legal determinations, it could have used more precise, and more narrow, language. Instead, the preclusion of review covers the ultimate action—a "grant" or a "denial."

Congress did use narrower language elsewhere in Section 2244(b)(3). Subsection (b)(3)(C) provides that a court of appeals may not authorize the filing of a second or successive application unless the prisoner "makes a prima facie showing that the application satisfies the requirements of this subsection"—*i.e.*, that it is based on new evidence that proves his innocence or a new rule of constitutional law that applies retroactively. If Section 2244(b)(3)(E) had been intended to prevent Supreme Court review only of the determination that those gatekeeping requirements have not been satisfied, Congress could have used in subsection (b)(3)(E) the language that it used in subsection (b)(3)(C); *i.e.*, it could have said that "[t]he determination by a court of appeals of whether the application makes a prima facie showing that it satisfies the requirements of this subsection" may not be the subject of a petition for a writ of certiorari. But it did not do so. In view of the language chosen by Congress, the better reading of Section 2244(b)(3)(E) is that it deprives this Court of jurisdiction to review the entirety of the court of appeals' decision, not some part of it.[5]

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[5] This Court has given a similar interpretation to another jurisdictional statute, albeit one that vested, rather than withholding, jurisdiction. Interpreting 28 U.S.C. 1253, which gives the Court appellate jurisdiction to review a three-judge district court's

2. Contrary to the contention of petitioner's amicus (NACDL Br. 13-14), the conclusion that this Court lacks jurisdiction to review a court of appeals' determination that a Section 2255 motion is second or successive does not conflict with this Court's decision in *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998). That case holds that Section 2244(b)(3)(E) does not deprive the Court of jurisdiction to review a court of appeals' determination that a habeas corpus application is *not* second or successive. *Id.* at 641-642. This Court had jurisdiction in *Martinez-Villareal* because the court of appeals did not "grant or den[y] * * * authorization" to file a second or successive petition, 28 U.S.C. 2244(b)(3)(E); the court of appeals held that there was "no need * * * to apply for authorization," 523 U.S. at 642. In this case, by contrast, the court of appeals concluded that petitioner's motion was second or successive and did not satisfy the gatekeeping requirements of Section 2255. It therefore "deni[ed] * * * authorization" to file the motion. 28 U.S.C. 2244(b)(3)(E).

It is true that, under this interpretation of Section 2244(b)(3)(E), only the government—or, in a case involving 28 U.S.C. 2254, the state—will be able to petition this Court for review of a court of appeals' determination of whether a collateral challenge is second or successive. But such asymmetry in a statute governing this Court's jurisdiction is not without precedent.

"order granting or denying * * * an * * * injunction," the Court has held that an appeal under that provision "brings the 'whole case' before the Court," *Fusari* v. *Steinberg*, 419 U.S. 379, 388 n.13 (1975) (quoting *United States* v. *Raines*, 362 U.S. 17, 27 n.7 (1960)), and that it has "jurisdiction of the entire appeal" from the order granting injunctive relief, including the declaratory judgment that was the "predicate" for the injunction, *White* v. *Regester*, 412 U.S. 755, 760-761 (1973).

Under 28 U.S.C. 1252, which was repealed in 1988, the Court had appellate jurisdiction to review a decision of "any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States or any of its agencies, * * * officer[s] or employee[s] is a party." 28 U.S.C. 1252 (1982). That statute treated the government more favorably than the opposing party in two respects. First, while a district court's decision invalidating a federal law could be appealed directly to this Court, a district court's decision upholding the law could not be. Second, while this Court's jurisdiction to review a court of appeals' decision invalidating a federal law was appellate (and therefore mandatory), the Court had only certiorari (and therefore discretionary) jurisdiction to review a court of appeals' decision upholding the law. Any suggestion that Congress could not have intended to accord preferential treatment to the government in obtaining review by this Court would be difficult to reconcile with the fact that Congress once did so explicitly in another statute.[6]

3. The conclusion that this Court lacks jurisdiction to review a court of appeals' determination that a Section 2255 motion is second or successive does not conflict with the view that a factual or legal determination by an *administrative agency* that triggers a preclusion of review provision may be subject to judicial review.

[6] The fact that the government can seek review of a court of appeals' determination that a motion is not second or successive answers any objection that the proposed interpretation of Section 2244(b)(3)(E) would deprive this Court of the ability to establish uniform standards for determining whether a motion is second or successive. See, *e.g.*, *Martinez-Villareal*, 523 U.S. at 641-646 (holding that habeas corpus application is not second or successive when it was previously dismissed as premature).

Cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978) (preclusion of review of EPA "emission standard" in criminal case did not bar review of question whether particular agency regulation was "emission standard"). For example, 8 U.S.C. 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final [administrative] order of removal against an alien who is removable by reason of having committed a [certain type of] criminal offense," including an aggravated felony. Interpreting the provision in *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), the Court observed that "[t]he scope of this preclusion is not entirely clear," and that, although "the text of the provision is quite broad," it is "not without its ambiguities." *Id.* at 350 n.2. The Court then noted the government's concession that, while Section 1252(a)(2)(C) prohibits courts of appeals from reviewing challenges to removal orders, it does not deprive them of "the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an 'aggravated felony' within the meaning of the statute)." *Ibid.* These issues, however, were not presented in the case, and the Court did not address them. See *ibid.*

The jurisdictional question in this case, moreover, is different from the one in *Calcano-Martinez*. Interpreting 8 U.S.C. 1252(a)(2)(C) to preclude judicial review even of questions subsidiary to removability would prevent an alien from obtaining access to the courts on any question related to removability, and would give an Executive Branch agency the final say on all such issues. Under the proposed interpretation of 28 U.S.C. 2244(b)(3)(E), in contrast, it is not an administrative agency but a federal court of appeals panel that has

the final say on the subsidiary issue in question (whether a motion is second or successive), and the only judicial review that is unavailable to a prisoner is rehearing by the court of appeals and the exercise of this Court's discretionary jurisdiction. To the extent that a narrow interpretation of Section 1252(a)(2)(C) may be justified by the "presumption that Congress intends judicial review of administrative action," *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), that concern is not present here. See also *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001) (referring to "the strong presumption in favor of judicial review of administrative action" in case holding that 8 U.S.C. 1252(a)(2)(C) does not deprive courts of jurisdiction under 28 U.S.C. 2241 to decide question relating to alien's deportability).

C. Section 2244(b)(3)(E) Applies To An Appeal Affirming The Dismissal Of A Section 2255 Motion As Second Or Successive

The court of appeals' determination that petitioner's Section 2255 motion was second or successive was made in deciding an appeal from the dismissal of the motion, rather than a request by petitioner for authorization to file a second or successive motion. Section 2244(b)(3)(E) nevertheless deprives this Court of jurisdiction to review the court of appeals' decision. A contrary view would permit a defendant to circumvent the restrictions Congress placed on review of gatekeeping decisions simply by taking a different route to the court of appeals.

1. What Section 2244(b)(3)(E) deprives this Court of jurisdiction to review is not the grant or denial of *a motion* for authorization to file a second or successive application, but the grant or denial of "an authorization"

to file one. If, instead of filing a motion in the court of appeals, a prisoner appeals the dismissal of a Section 2255 motion found to be second or successive, and if the court of appeals, in deciding the appeal, determines that AEDPA's gatekeeping requirements have not been satisfied, the effect of its decision is to deny authorization to file the motion. That is what happened here.

2. While AEDPA specifies a procedure for seeking authorization to file a second or successive Section 2255 motion, it does not specify a procedure for challenging a district court's determination that a motion is second or successive. The lower courts generally permit the challenge to be made either in an appeal of the district court's decision or in a Section 2244(b) authorization motion.[7] Since it is unlikely that Congress intended

[7] District courts in some circuits are required to transfer an unauthorized second or successive Section 2255 motion to the court of appeals under 28 U.S.C. 1631, see *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Coleman* v. *United States*, 106 F.3d 339, 341 (10th Cir. 1997); *Liriano* v. *United States*, 95 F.3d 119, 123 (2d Cir. 1996); see also *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594, 596 & n.7 (2002) (Stevens, J., dissenting from dismissal of writ of certiorari as improvidently granted) (Section 2254 motion), while district courts in other circuits may either transfer such a motion or simply dismiss it, see *United States* v. *Winestock*, No. 02-6304, 2003 WL 1949822, at *6 (4th Cir. Apr. 25, 2003); *Boyd* v. *United States*, 304 F.3d 813, 814 (8th Cir. 2002), cert. denied, 123 S. Ct. 1642 (2003); *Pratt* v. *United States*, 129 F.3d 54, 57 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998). In cases in which the district court dismisses, courts of appeals have permitted a prisoner to challenge the finding that the motion is second or successive either by filing a motion in the court of appeals under Section 2244(b), see, *e.g.*, *Henderson* v. *United States*, 264 F.3d 709 (7th Cir. 2001); *In re Moore*, 196 F.3d 252 (D.C. Cir. 1999); *In re Tolliver*, 97 F.3d 89 (5th Cir. 1996); see also *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (Section 2254 motion), or by filing an appeal from the dismissal, see, *e.g.*, *McIver* v. *United States*, 307 F.3d 1327 (11th Cir. 2002);

that the jurisdiction of this Court would depend on the happenstance that the parties and the courts chose one rather than another of two available procedural mechanisms, Section 2244(b)(3)(E) should be construed to apply to both. It would make little sense if this Court could review a determination that a Section 2255 motion is second or successive when the determination is made in deciding an appeal, but could not do so when it is made in ruling on an authorization motion.

3. While it might be argued that the only proper way to challenge a district court's determination that a motion is second or successive is by filing an appeal (assuming the prisoner is able to obtain a certificate of appealability[8]), and that the only proper purpose of a Section 2244(b) motion is to convince the court of appeals that the gatekeeping requirements have been satisfied, there is tension, if not inconsistency, between that view and AEDPA's purposes. If a motion that the district court finds to be second or successive is not transferred to the court of appeals and an appeal from the dismissal is not treated as a motion under Section 2244(b), the prisoner might still be able to file a sepa-

United States v. *Palmer*, 296 F.3d 1135 (D.C. Cir. 2002); *Garrett* v. *United States*, 178 F.3d 940 (7th Cir. 1999), although courts of appeals routinely treat a notice of appeal as a request for authorization under Section 2244(b), see, *e.g.*, *Winestock*, 2003 WL 1949822, at *7; *United States* v. *Hayden*, 255 F.3d 768, 770 n.3 (9th Cir.), cert. denied, 534 U.S. 969 (2001); *Pratt*, 129 F.3d at 58; *Nuñez* v. *United States*, 96 F.3d 990, 991 (7th Cir. 1996).

[8] To obtain a certificate of appealability, see 28 U.S.C. 2253(c), a prisoner must show that "jurists of reason would find it debatable [both] whether the [motion] states a valid claim of the denial of a constitutional right and * * * whether the district court was correct in its procedural ruling," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000).

rate motion in the court of appeals in which he requests permission to file a second or successive Section 2255 motion. At least in some cases, the appeal and the motion would then proceed on different tracks. The result in such cases would be a multiplication of proceedings and delay, two consequences that are squarely at odds with AEDPA's goals of "simplify[ing] and speed[ing] the federal habeas process," *Breedlove* v. *Moore*, 279 F.3d 952, 959 (11th Cir. 2002), cert. denied, 123 S. Ct. 1278 (2003), "discourag[ing] repetitive and piecemeal litigation," *Triestman* v. *United States*, 124 F.3d 361, 378 (2d Cir. 1997), and "streamlin[ing] the [second or successive] habeas application process," *Browning* v. *United States*, 241 F.3d 1262, 1266 (10th Cir. 2001).

The better view is that a Section 2244(b) motion in the court of appeals is the appropriate vehicle for challenging a district court's determination that a Section 2255 motion is second or successive. While AEDPA itself does not require a district court to transfer a second or successive Section 2255 motion to the court of appeals, and does not require a court of appeals to treat an appeal from a dismissal of such a motion as an authorization request under Section 2244(b), courts "must exercise [their] discretion in a manner consistent with the objects of the statute." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). Since AEDPA's purposes would be impaired if a prisoner were able to litigate in different proceedings, at different times, claims that bear upon his ability to file a Section 2255 motion determined by a district court to be second or successive, district courts should transfer Section 2255 motions that they find to be second or successive, and courts of appeals should treat appeals from motions

that are dismissed (rather than transferred) as motions for authorization under Section 2244(b).

4. In the absence of a categorical requirement that a Section 2244(b) motion be used to challenge a district court's determination that a Section 2255 motion is second or successive, there may be decisions on appeal from the dismissal of a second or successive motion that this Court will have jurisdiction to review. If a court of appeals affirms a district court's dismissal of a Section 2255 motion as second or successive and, unlike the court of appeals in this case, does not address the question whether the gatekeeping requirements have been satisfied, the court can probably not be said to have "deni[ed] * * * authorization * * * to file a second or successive application." 28 U.S.C. 2244(b)(3)(E). That this Court's jurisdiction would depend on whether the court of appeals addressed the gatekeeping issue in affirming the dismissal of a Section 2255 motion as second or successive is perhaps the strongest objection to the interpretation of Section 2244(b)(3)(E) under which appeals and Section 2244(b) motions are treated identically.

On balance, however, that is not a sufficiently strong objection to compel a contrary interpretation. First, the best evidence of congressional intent is the language of the statute, and the language of Section 2244(b)(3)(E), fairly read, is broad enough to cover appeals. Second, if there is a loophole in Section 2244(b)(3)(E) for appeals from dismissals in which no decision is reached on the gatekeeping issue, the loophole is small, because there are unlikely to be many such cases. District courts often transfer to the court of appeals, as gatekeeper, a Section 2255 motion found to be second or successive. When such a motion is not transferred but dismissed, a prisoner may be unable to

obtain a certificate of appealability. Even when a certificate of appealability has been granted, courts of appeals often treat an appeal from a dismissal as a motion for authorization. And when such an appeal is not explicitly treated as an authorization motion, courts of appeals, in affirming the dismissal, may often find, as will obviously be the case, that the prisoner has not satisfied the gatekeeping requirements. Therefore, any potential loophole where a court of appeals does not decide the gatekeeping issue should not dictate the result where the court of appeals does decide the issue, and thereby renders a "denial" of authorization to file a Section 2255 motion within the meaning of Section 2244(b)(3)(E). In the latter situation, which is this case, Congress's purpose to streamline, simplify, and speed the process of post-conviction litigation supports ending the proceedings with the decision of the court of appeals.

II. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S SECTION 2255 MOTION AS SECOND OR SUCCESSIVE

If this Court concludes that it has jurisdiction to consider petitioner's claim that his Section 2255 motion is not second or successive, the claim should be rejected. The district court treated petitioner's first post-conviction motion as one filed under both Federal Rule of Criminal Procedure 33 and 28 U.S.C. 2255, and denied it; the court of appeals affirmed; and petitioner did not seek this Court's review. The decision that petitioner's first motion should be regarded as a Section 2255 motion was thus the law of the case when petitioner filed his second motion, and is not subject to challenge now.

A. The District Court's Characterization Of Petitioner's First Post-Conviction Motion Was The Law Of The Case When Petitioner Filed His Second Post-Conviction Motion

There is no dispute that petitioner's second post-conviction motion was brought under 28 U.S.C. 2255. What is in dispute is whether the motion is "second or successive." Petitioner and his amicus contend that it was not. They argue that his first motion was properly filed under Rule 33; that petitioner did not consent to its characterization as a motion under Section 2255; and that he was not given notice that it would be so characterized. Pet. Br. 14-25; NACDL Br. 14-26. But no such challenge was made to the district court's characterization of petitioner's first post-conviction motion in his appeal from the denial of that motion, despite the fact that he had an opportunity and incentive to do so. As explained below, the district court's characterization of petitioner's first post-conviction motion was therefore the law of the case when he filed his second post-conviction motion, and his belated challenge was properly rejected.

1. *When a district court's decision is not challenged on appeal, it is the law of the case at later stages of the litigation*

Under the doctrine of law of the case, "when an issue is once litigated and decided, that should be the end of the matter," *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950), and "th[e] decision should continue to govern the same issues in subsequent stages in the same case," *Arizona* v. *California*, 460 U.S. 605, 618 (1983). Like res judicata and collateral estoppel, law of the case is a principle of preclusion. It "promotes the finality and effi-

ciency of the judicial process by 'protecting against the agitation of settled issues,'" *Christianson* v. *Colt Industrial Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[1], at 118 (1984)), and prevents "obstinate litigant[s] * * * , by repeated appeals, [from] compel[ling] a court to listen to criticisms on their opinions," *Roberts* v. *Cooper*, 61 U.S. (20 How.) 467, 481 (1857).

When a party challenges a district court's decision on appeal and the court of appeals rules against him, the court of appeals' decision becomes the law of the case in subsequent proceedings in the district court. See, *e.g.*, *Great W. Tel. Co.* v. *Burnham*, 162 U.S. 339, 343-344 (1896); *White* v. *Murtha*, 377 F.2d 428, 431, 432 (5th Cir. 1967). For example, when an issue is decided against a criminal defendant on direct appeal from his conviction and sentence, the decision is law of the case when the defendant later files a motion to correct his sentence under Federal Rule of Criminal Procedure 35, see *United States* v. *Mazak*, 789 F.2d 580, 581-582 (7th Cir. 1986); *Paul* v. *United States*, 734 F.2d 1064, 1065-1066 (5th Cir. 1984), or a motion under 28 U.S.C. 2255, see *United States* v. *Hayes*, 231 F.3d 1132, 1139-1140 (9th Cir. 2000); *Daniels* v. *United States*, 26 F.3d 706, 711-712 (7th Cir. 1994). Law of the case has likewise been held to preclude relitigation of an issue raised in a later habeas corpus petition when the issue was decided against the prisoner on appeal from the denial of an earlier petition. See *Shore* v. *Warden*, 942 F.2d 1117, 1122-1124 (7th Cir. 1991), cert. denied, 504 U.S. 922 (1992); *Raulerson* v. *Wainwright*, 753 F.2d 869, 875 (11th Cir. 1985).

Law of the case is also applicable when a losing party does *not* challenge an adverse district court decision on

appeal. In such a case, the decision of the *district court* becomes the law of the case. In a frequently quoted passage, the D.C. Circuit has stated the principle this way:

> Under law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.

Williamsburg Wax Museum, Inc. v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (1987). Accord *United States* v. *Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997); *North River Ins. Co.* v. *Philadelphia Reins. Corp.*, 63 F.3d 160, 164 (2d Cir. 1995), cert. denied, 516 U.S. 1184 (1996); *Capps* v. *Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993); *United States* v. *Bell*, 988 F.2d 247, 250 (1st Cir. 1993). As Judge Friendly has explained, the reason for treating an unchallenged ruling of the district court as the law of the case is that "[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982). Applying law of the case under these circumstances "forc[es] parties to raise issues whose resolution might spare the court and parties later rounds of * * * appeals." *Hartman* v. *Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), cert. denied, 520 U.S. 1240 (1997).

It is sometimes said that the doctrine of law of the case applies only when the court of appeals has actually decided the issue at an earlier stage of the litigation,

and that the analysis when the district court's decision was not challenged on appeal involves the distinct principles of waiver and forfeiture. See *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir.), cert. denied, 516 U.S. 865 (1995); 18B Charles A. Wright et al., *Federal Practice and Procedure* § 4478.6, at 820-828 (2d ed. 2002).[9] But whatever the appropriate terminology, the substance of the rule is the same: a party that fails to challenge a decision on appeal is generally bound by the decision in later stages of the litigation.

2. Petitioner did not challenge the district court's characterization of his first post-conviction motion when he appealed the denial of the motion

a. When petitioner filed his first post-conviction motion in 1994, he objected to its being characterized as a motion under Section 2255. J.A. 116. See pp. 4-5 & note 2, *supra*. His objection was not sustained. The district court treated the motion as one requesting relief under both Rule 33 and Section 2255, J.A. 139-140, and denied it. In his appeal, petitioner challenged the district court's denial of relief and its refusal to hold an evidentiary hearing, but he did not challenge the district court's characterization of his motion. See 94-9270 Pet. C.A. Br. 10-41; 94-9270 Pet. C.A. Reply Br. 5-21. Describing the district court's decision as "the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33," J.A. 147, the court of appeals summarily affirmed. Petitioner did not seek review in this Court.

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[9] Waiver is the "intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), while forfeiture is the "failure to make the timely assertion of a right," *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

When petitioner filed his second post-conviction motion in 1997, it was denied on the merits, but the court of appeals vacated the decision and directed the district court to "examine the record" on remand to "determine if this petition is successive." J.A. 172. On remand, in his opposition to the government's motion to dismiss, and again in his objections to the magistrate judge's recommendation that the government's motion be granted, petitioner argued, for the first time since his first post-conviction motion was filed, that the district court had erred in treating the motion as one under Section 2255. Pet. Resp. to Gov't Mot. to Dismiss 2-4; Pet. Objections to Magistrate Judge's Report & Recommendation 2-11. In its response to petitioner's opposition, and again in its response to his objections, the government pointed out that petitioner "never took issue with the district court's designation of the motion as one pursuant to section 2255 in his initial or reply * * * brief" on appeal from the denial of the motion. Gov't Post-Hearing Br. 6-7; Gov't Response to Combined Objections to Report & Recommendation 2. After the district court granted the government's motion to dismiss and granted petitioner's motion for a certificate of appealability, petitioner filed an appeal, arguing, again, that his first post-conviction motion had been improperly characterized as a motion under Section 2255. 01-12181-I Pet. C.A. Br. 8-24. In its brief on appeal, the government again pointed out that petitioner had not challenged that characterization in his appeal from the denial of the motion, 01-12181-I Gov't C.A. Br. 10-12, and argued that his "failure to pursue an objection in the 1994 proceeding precludes him from

complaining about the characterization now," *id.* at 12. The court of appeals affirmed.[10]

If, in his appeal from the denial of his first post-conviction motion, petitioner had challenged the district court's decision to treat the motion as one under Section 2255, and if the court of appeals had explicitly held that the characterization was proper, the court of appeals' decision would certainly have bound the parties when petitioner filed his second post-conviction motion. The result should be the same when there has been a failure to challenge the district court's decision in the appeal of the denial of the first motion. If petitioner had called the characterization issue to the attention of the court of appeals at the first available opportunity, the present appeal could have been avoided, and there might finally have been an end to the challenges to the verdict of the jury that found petitioner guilty more than a decade ago.

b. While law of the case is "only a discretionary rule of practice," *United States Smelting Refining & Mining*

[10] The government thus, in substance, relied on law of the case preclusion principles in the court below and is free to defend the judgment on that ground. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 300 n.3 (1993). Although the government did not advance the law of the case argument in its brief in opposition, it has not thereby waived the argument. The question presented in the certiorari petition was whether, when a district court "re-characterizes a pro-se federal prisoner's first post conviction [sic] motion as a habeas petition under 28 U.S.C. § 2255," such recharacterization "render[s] the prisoner's subsequent attempt to file a first titled § 2255 petition a 'second or successive petition' [under AEDPA]." Pet. 2. While an "objection to consideration of a question presented * * * may be deemed waived unless called to the Court's attention in the brief in opposition," Sup. Ct. R. 15.2, the doctrine of law of the case is not the basis for an objection to considering the question presented. It is the basis for answering the question.

Co., 339 U.S. at 199, and "not an inexorable command," *White* v. *Murtha*, 377 F.2d at 431, the doctrine "should not be lightly disregarded," *Shore*, 942 F.2d at 1123 (citation omitted). An issue decided at one stage of a case may be relitigated at a later stage only in "extraordinary circumstances." *Christianson*, 486 U.S. at 817. The justifications for applying the law of the case doctrine are especially compelling in the context of post-conviction proceedings, where principles of waiver and forfeiture are fundamental features of the procedural rules developed by this Court. In *United States* v. *Frady*, 456 U.S. 152 (1982), for example, the Court held that a prisoner who failed to raise a claim at trial or on direct appeal may not raise the claim in a Section 2255 motion unless he demonstrates "cause" that excuses the default and "actual prejudice" from the asserted error. *Id.* at 167. And in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), the Court interpreted the pre-AEDPA abuse of the writ doctrine to mean that a prisoner who failed to raise a claim in his first habeas corpus application may not raise it in a second application unless he demonstrates cause and prejudice or actual innocence. *Id.* at 493-496. The primary purpose of these rules, the Court has explained, is to vindicate "society's legitimate interest in the finality of [a criminal] judgment," *Frady*, 456 U.S. at 164, without which "the criminal law is deprived of much of its deterrent effect," *McCleskey*, 499 U.S. at 491 (quoting *Teague* v. *Lane*, 489 U.S. 288, 309 (1989)). See also *Calderon* v. *Thompson*, 523 U.S. 538, 554-555 (1998).

A similar principle should govern in cases like this one. When a federal prisoner fails to challenge on appeal from the denial of a post-conviction motion the district court's characterization of the motion as one under 28 U.S.C. 2255, that decision should bind the

parties at future stages of the post-conviction litigation unless the prisoner can demonstrate a valid excuse for his default. A person in custody under a final criminal judgment should be given one, and only one, opportunity to convince the district court, the court of appeals, and this Court that a post-conviction motion was improperly characterized as a motion under Section 2255.

The same rule should apply to the government. If a post-conviction motion is characterized as something *other than* a motion under 28 U.S.C. 2255, and the government does not challenge the characterization on appeal or cross-appeal of the district court's ruling on the motion, the parties should be bound by *that* characterization in subsequent stages of the post-conviction litigation. Cf. *Demarest* v. *Price*, 130 F.3d 922, 942 n.9 (10th Cir. 1997) (because, on appeal from district court's decision granting writ of habeas corpus, warden did not challenge determination that state prisoner received ineffective assistance counsel, that determination is law of the case in future proceedings).[11]

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[11] The en banc Sixth Circuit has stated, in dictum, that "it is not at all clear * * * that the law-of-the-case doctrine should apply to successive habeas [corpus] petitions," because "it [is] likely that each * * * petition is a separate and distinct case." *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 398 n.11 (2003), petition for cert. pending, No. 02-1464. Unlike an application under 28 U.S.C. 2254, "a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action." Rule 1 of the Rules Governing Section 2255 Proceedings for the United States District Courts, advisory comm. note (citing S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948)). In any event, whether or not the law of the case doctrine strictly applies in post-conviction proceedings—and at least four courts of appeals have concluded that it does, see p. 28, *supra*—it is beyond dispute that principles of waiver and forfeiture do.

c. In support of his contention that his first post-conviction motion was improperly characterized, petitioner relies (Br. 20-21) on the Second Circuit's decision in *Adams* v. *United States*, 155 F.3d 582 (1998), and decisions from nine other circuits that follow either the rule established in *Adams* or some variation on it. See NACDL Br. 22 (citing cases). *Adams* held that a post-conviction motion may not be characterized as a Section 2255 motion unless (a) the prisoner, "with knowledge of the potential adverse consequences," agrees to have the motion so characterized or (b) the district court finds that the motion should be treated as one under 28 U.S.C. 2255 "because of the nature of the relief sought," and the court gives the prisoner an opportunity to withdraw the motion rather than having it so characterized. *Id.* at 584. Both *Adams* itself and five of the nine cases that follow it are consistent with the principles of law of the case and forfeiture outlined in this brief, because the prisoner in each of those cases challenged the characterization of his post-conviction motion in an appeal from the denial of that motion—not, as in this case, in an appeal from the dismissal of a subsequent motion. See *Morales* v. *United States*, 304 F.3d 764, 765 (8th Cir. 2002); *United States* v. *Emmanuel*, 288 F.3d 644, 646-647 (4th Cir. 2002); *United States* v. *Kelly*, 235 F.3d 1238, 1240-1241 (10th Cir. 2000); *United States* v. *Seesing*, 234 F.3d 456, 458-459 (9th Cir. 2000); *United States* v. *Miller*, 197 F.3d 644, 646-647 (3d Cir. 1999); *Adams*, 155 F.3d at 582-583.

While the other cases that follow *Adams* do involve a challenge to a characterization decision made at an earlier stage of the proceedings, see *United States* v. *Palmer*, 296 F.3d 1135, 1137-1140 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 621 (6th Cir. 2002); *Henderson* v. *United States*, 264 F.3d 709, 710-711 (7th Cir. 2001);

Raineri v. *United States*, 233 F.3d 96, 98-99 (1st Cir. 2000), none explains why the prisoner was excused from the requirement that claims be raised at the earliest opportunity. The author of one of those decisions, moreover, has subsequently expressed doubt about the propriety of permitting an untimely challenge. In *Carter* v. *United States*, 312 F.3d 832 (7th Cir. 2002), an appeal from the denial of a post-conviction application treated as a motion under 28 U.S.C. 2255, Judge Posner described the Seventh Circuit's decision in *Henderson* as one that permitted "a belated appeal from the improper denial of [the prisoner's] first motion." 312 F.3d at 833. Judge Posner then acknowledged that "[i]t is clearer that [the prisoner] could have appealed from that first denial, an error potentially harmful to him, than that we should have allowed him to take in effect an untimely appeal from it." *Ibid.* The opinion goes on to say that "[u]ntimely appeals are not authorized," and that "decisions founded on a legal error are ordinarily treated as erroneous"—and therefore governed by principles of procedural default—"rather than void." *Ibid.*

3. Petitioner had an opportunity and incentive to challenge the district court's characterization of his first post-conviction motion on appeal

When a party fails to challenge a district court's decision on appeal, the decision may not be the law of the case in subsequent proceedings if the party did not have "an opportunity and an incentive to raise [the claim] * * * on appeal." *United States* v. *Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002), cert. denied, No. 02-1191 (June 2, 2003). See also *United States* v. *Becerra*, 155 F.3d 740, 755 (5th Cir. 1998) (no exception to law of the case when party had "the means and incentive" to

raise claim in earlier appeal). Cf. Restatement (Second) of Judgments § 28(5)(c) (1982) (exception to issue preclusion when party sought to be precluded "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action"). That exception does not apply here.

Petitioner certainly had an opportunity to challenge the district court's characterization of his first post-conviction motion. After the motion was denied, he filed an appeal in which he challenged the district court's denial of the motion and its refusal to hold an evidentiary hearing. There is no reason why he could not have challenged the characterization of the motion as well. See *Carter*, 312 F.3d at 833 (rejecting claim that appeal of characterization of first post-conviction motion was premature); *Kelly*, 235 F.3d at 1241 (same). See also *Seesing*, 234 F.3d at 458-464 (defendant raised, and court of appeals decided, four claims on appeal, including claim that district court had improperly characterized motion as one under 28 U.S.C. 2255).

In addition to having the opportunity, petitioner had an incentive to challenge the district court's characterization of his first post-conviction motion, because it substantially impaired his ability to file a subsequent motion under Section 2255. While the appeal from the denial of petitioner's first post-conviction motion predated the enactment of AEDPA, AEDPA was not a complete innovation in the law. As this Court has observed, AEDPA placed "further restrict[ions]" on the ability of prisoners to file a second or successive motion. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996).

The version of Section 2255 in effect when petitioner filed his first post-conviction motion provided that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on

behalf of the same prisoner." 28 U.S.C. 2255 (1994). Under Rule 9(b) of the Rules Governing Section 2255 Proceedings, "[a] second or successive motion may be dismissed * * * if new and different grounds are alleged[] [and] the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." At the time of petitioner's appeal, this Court had interpreted the doctrine of abuse of the writ to mean that a state prisoner could not assert new claims in a second or successive habeas corpus application unless he demonstrated either cause and prejudice or actual innocence. See *McCleskey*, 499 U.S. at 493-496. The effect of that holding, which had been extended to Section 2255 motions by the time of petitioner's first motion, see *United States* v. *Richards*, 5 F.3d 1369, 1370 (10th Cir. 1993); *United States* v. *Fallon*, 992 F.2d 212, 213 (8th Cir. 1993); *United States* v. *Flores*, 981 F.2d 231, 234-235 (5th Cir. 1993); *Andiarena* v. *United States*, 967 F.2d 715, 717 (1st Cir. 1992); *United States* v. *MacDonald*, 966 F.2d 854, 858 (4th Cir.), cert. denied, 506 U.S. 1002 (1992), was to create a presumption that a federal prisoner could not file a second or successive Section 2255 motion.

Petitioner therefore had every incentive to contest on appeal the district court's characterization of his first motion as a request for relief under Section 2255. Indeed, at the time of his second post-conviction motion, petitioner explicitly acknowledged, in his objections to the magistrate judge's recommendation, that characterizing his first motion as one under 28 U.S.C. 2255, "even pre-AEDPA, would have prevented [him] from filing a section 2255 [motion] presenting other claims known at the time." Pet. Pro Se Objections to Magistrate Judge's Report & Recommendation 1.

B. This Case Does Not Require The Court To Establish Standards For Deciding Whether A Post-Conviction Motion Has Been Properly Characterized As One Under 28 U.S.C. 2255

1. If the Court determines that 28 U.S.C. 2244(b)(3)(E) does not deprive it of jurisdiction, it can resolve this case on the ground that a district court's characterization of a first post-conviction motion as one under 28 U.S.C. 2255, unchallenged by the prisoner in his appeal from the denial of the motion, binds the parties when the prisoner files a subsequent post-conviction motion. That principle, however, will not be applicable in a variety of situations involving a challenge to the characterization of a post-conviction motion as one under Section 2255.

For example, law of the case will not apply when the prisoner has filed only one post-conviction motion and challenges the characterization of the motion in the appeal from the motion's denial. That is what happened in several of the cases on which petitioner relies. See *Morales*, 304 F.3d at 765; *Emmanuel*, 288 F.3d at 646-647; *Kelly*, 235 F.3d at 1240-1241; *Seesing*, 234 F.3d at 458-459; *Miller*, 197 F.3d at 646-647; *Adams*, 155 F.3d at 582-583. Law of the case will also be inapplicable when the prisoner has filed two post-conviction motions, it is the second motion that is recharacterized, and the prisoner challenges the recharacterization in an appeal from the dismissal of that motion as second or successive. That is what happened in *Abdur'Rahman* v. *Bell*, 123 S. Ct. 594 (2002), a Section 2254 case in which this Court granted certiorari and then dismissed the writ as improvidently granted. See *id.* at 594-596 (Stevens, J., dissenting). A third example of a case in which the characterization issue will not be resolved by law of the case principles is where the prisoner has filed

two post-conviction motions, the first one is characterized as a motion under Section 2255 when the second motion is filed, and the prisoner challenges the characterization of the first motion when the second motion is dismissed as second or successive. That is what happened in *Ruth* v. *United States*, 266 F.3d 658 (7th Cir. 2001). In each of these cases, the characterization decision was challenged at the earliest possible opportunity.

If the Court again grants certiorari in a case of the type just described, it will be necessary (assuming the Court has jurisdiction) to establish standards for determining when a post-conviction motion is to be treated as a motion under 28 U.S.C. 2255. Although it is not necessary to establish such standards in this case, the government submits that a motion should be treated as a Section 2255 motion at least under the following circumstances: (1) when the motion is denominated a Section 2255 motion and seeks relief available under Section 2255; (2) when the motion is not denominated a Section 2255 motion but seeks relief available only under Section 2255; and (3) when the motion is not denominated a Section 2255 motion and does not seek relief available only under Section 2255, but the prisoner has consented to its characterization as a Section 2255 motion. The standards would of course require elaboration and refinement in an appropriate case, but these are readily apparent circumstances in which a prisoner's post-conviction motion can appropriately be said to be one under 28 U.S.C. 2255.

2. *Adams* and the cases that follow it generally hold that a recharacterized post-conviction motion cannot be treated as a Section 2255 motion unless the prisoner was notified of the district court's intention to recharacterize the motion, warned of the consequences, and

given an opportunity to amend or withdraw the motion so that he may include all of his claims in a single motion. See *Morales*, 304 F.3d at 767; *Palmer*, 296 F.3d at 1146; *Shelton*, 295 F.3d at 622; *Emmanuel*, 288 F.3d at 646-647; *Henderson*, 264 F.3d at 710-711; *Kelly*, 235 F.3d at 1240-1241; *Seesing*, 234 F.3d at 458-459; *Raineri*, 233 F.3d at 100-101; *Miller*, 197 F.3d at 646-647; *Adams*, 155 F.3d at 582-583. The court of appeals in this case also adopted a rule of this type, albeit prospectively. See J.A. 203-206.

These notice requirements have no basis either in AEDPA or in the rules that govern Section 2255 proceedings. As Judge Posner observed in *Henderson*, "[t]here is no general equity escape hatch in the Antiterrorism and Effective Death Penalty Act * * * . Lack of full knowledge of the consequences of one's acts * * * is not a basis for waiving AEDPA's explicit requirements." 264 F.3d at 711. A prisoner who files a post-conviction motion that *is* denominated a Section 2255 motion is held accountable for the legal consequences, one of which is that the motion will likely be the only one he is permitted to file. The same accountability should attach when a prisoner's post-conviction motion is a Section 2255 motion in substance though not in name or when he agrees that his motion may be recharacterized as one under Section 2255. Under the pre-AEDPA abuse of the writ doctrine, recharacterization of a post-conviction motion also had the practical effect of preventing the prisoner from filing a second Section 2255 motion, yet courts had not engrafted a prerequisite of notice. The advent of AEDPA does not justify or necessitate such a change.

The approach adopted by a majority of the courts of appeals does have certain virtues, one of which is certainty. When a prisoner in those circuits has received

the required notice and either given his consent to recharacterization or refused to withdraw the motion, the post-conviction motion is a Section 2255 motion; when he has not, it is not. Such a rule is likely to reduce and simplify litigation over questions of characterization, which are often quite difficult. See, *e.g.*, *United States* v. *Evans*, 224 F.3d 670, 673-674 (7th Cir. 2000) (discussing when Rule 33 motion should be treated as Section 2255 motion). It may be appropriate, moreover, to view the notice requirements established by the courts of appeals as local rules of practice that the courts have the authority to adopt under Federal Rule of Appellate Procedure 47. In any event, this Court may well have the authority to establish a uniform notice requirement for the federal judiciary through the exercise of its supervisory powers. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332, 340-341 (1943).

A decision on whether a notice requirement is appropriate, however, should await a case in which the district court's characterization decision was not established as the law of the case at an earlier stage of the post-conviction proceedings. This case should be decided on the ground that prisoners are bound by characterization decisions that have not been challenged at the earliest opportunity.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Paragraph 1 of 28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

2. Paragraph 8 of 28 U.S.C. 2255 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

3. Subsection (a) of 28 U.S.C. 2254 provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

4. Subsection (b)(2) of 28 U.S.C. 2244 provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

5. Subsection (b)(3) of 28 U.S.C. 2244 provides:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Supreme Court, U.S.
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No. 02-6683

In The

Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE ELEVENTH CIRCUIT'S RULING THAT PETITIONER'S 1997 HABEAS PETITION IS SUCCESSIVE UNDER § 2255.

In its brief, the government argues that, pursuant to § 2244(b)(3)(E), this Court lacks jurisdiction to review the court of appeals ruling that Petitioner's 1997 § 2255 Petition is successive. (Govt's. Br. p. 15) The government begins by concluding that because the court of appeals not only decided that the petition was successive, but also determined that the 1997 motion did not meet the gatekeeping requirements of § 2255, that the court of appeals decision was ultimately to deny Petitioner "authorization" to file a successive motion (Govt's Br. p. 16) and, therefore, 28 U.S.C. § 2244(b)(3)(E) precludes this appeal. A closer look at the court of appeals decision is therefore warranted.

In its opinion, the court of appeals stated "therefore, this subsequent § 2255 petition, filed three years later, is successive because it does not meet either of the first two requirements found under the AEDPA-O'Ryan Castro's second petition does not contain newly discovered evidence, nor does the second petition address a new rule of constitutional law." (J.A. 202-203). The court of appeals did not determine that the 1997 petition was successive *and* that it did not meet the gatekeeping requirements; the court of appeals determined that the petition was successive *because* it did not meet the gatekeeping requirements. The court of appeals analysis is thus flawed because whether or not a petition meets the gatekeeping requirements of § 2255 has nothing to do with whether or not the petition is "successive." First petitions are not

required to meet the gatekeeping provisions of § 2255. The court of appeals never addressed the issue of whether or not Castro's initial Rule 33 Motion was wrongfully re-characterized. Castro's entire argument is that his 1997 petition was the *first* § 2255 petition which he filed. The court of appeals decision was that the petition was successive, but the court of appeals gave no legally accepted reason as to why. The court of appeals flawed reasoning is certainly not sufficient to prevent an appeal to this Court under § 2244(b)(3)(E). Petitioner is not appealing the court of appeals ruling that his first titled § 2255 petition did not meet the gatekeeping requirements of § 2255. Again, petitioner is appealing the court of appeals determination that his first titled § 2255 petition was *required* to meet the gatekeeping requirements.

Next, the government argues that § 2244(b)(3)(E) also makes the court of appeals the final decision maker for the determination that the petition is successive because according to the government, "the denial of authorization to file a second or successive motion represents a single order that encompasses two legal conclusions: that the § 2255 motion is second or successive, . . . " (Govt's. Br. p. 16). The government cites no authority for such a presumption and the plain wording of the statute makes clear that § 2244(b)(3)(E) only prevents appeals to this Court from court of appeals decisions with regard to the gatekeeping requirements. A denial of authorization by the court of appeals to file a successive motion does not also represent a conclusion that the petition is successive as the government suggests. It is the district court which rules on the post-conviction motion that sets the tone for the remainder of the appellate process. If the district court, as in this case, re-characterizes the post-conviction

motion as one made under § 2244 or 2255, then any subsequently titled § 2255 petition will be a successive petition requiring certification by the court of appeals to be heard. Once the district court "labels" the post-conviction motion as one made under § 2255, the petitioner is doomed unless new evidence is found or a new rule of constitutional law applies.

In other words, if a petitioner asks a court of appeals to authorize the filing of a second or successive motion, the determination that it is successive has already been made by the way the district court treats the first motion filed. Again, in this case, Castro has never requested authorization to file a second or successive petition, as it is his argument that the district court wrongfully re-characterized his first post-conviction motion and that the court of appeals erred in "presuming" that his first titled § 2255 petition was successive.

Next, the government argues that this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) does not conflict with the government's argument that this Court lacks jurisdiction to review the court of appeals decision that Petitioner's § 2255 Motion is successive. (Govt.'s Br. p. 18). In *Martinez-Villareal*, the Court held that it had jurisdiction to review a court of appeals decision that a petition was not successive because the court of appeals had not granted "respondent leave to file a second or successive application." *Id.*, at 642. This is the exact situation present in this case except Castro is arguing to this Court that the court of appeals was wrong in finding that he is required to apply for authorization to file his § 2255 petition. Whether the court of appeals finds that authorization is or is not required should have nothing to do with the appealability of the decision.

The government cannot have it both ways. In *Martinez-Villareal*, the government petitioner apparently argued that this Court does have jurisdiction to hear a decision by the court of appeals that a petition is not successive, but now argues that this Court does not have jurisdiction to hear a decision by the court of appeals that a petition is successive. This Court has jurisdiction to hear this appeal and has already decided this issue in its opinion in *Martinez-Villareal*.

Next, the government argues that the proper way for a petitioner to challenge a district court's determination that a motion is second or successive is by filing a § 2244(b) motion in the court of appeals, which would in essence prevent a further appeal to this Court under § 2244(b)(3)(E). (Govt.'s Br. p. 24). Filing a § 2244(b) motion in the court of appeals to challenge a district court's determination that a § 2255 motion is second or successive is not only inappropriate, it would in essence make the chances of success for the petitioner impossible.

Again, the gatekeeping requirements are nearly impossible for a petitioner to meet. If a district court is wrong in determining that a petition is second or successive, why would a petitioner admit to the court of appeals that the petition is successive in an attempt to obtain authorization under a motion pursuant to § 2244(b) to file it? First, the petitioner would usually have no chance of success under such a motion anyway, due to the severity of the gatekeeping requirements. Secondly, the purpose of the appeal to the court of appeals, like the appeal in this case, would be to obtain a ruling from the court of appeals as to whether the gatekeeping measures of § 2244(b) were required at all. Why would Castro ever ask the court of appeals to grant him permission to file a successive or

second petition, when Castro's entire argument is that his petition is not successive? The government simply argues that all appeals with regard to wrongful re-characterizations of petitions by district courts should be appealed through the one motion which, if denied, would prevent an appeal to this court. The problem with this argument is that the motion, one pursuant to § 2244(b), is not an appropriate tool for a petitioner to use to challenge the wrongful labeling of a petition as successive by the district court, for the preceding reasons.

Finally, the government ends its argument on the jurisdiction issue by suggesting that the Court look to the language of the statute, § 2244(b)(3)(E) to determine congressional intent. (Govt.'s Br. p. 25). Castro agrees. A plain reading of the statute shows that it is only the grant or denial of an *authorization* by a court of appeals to file a second or successive application which is not appealable. The statute is silent on the appealability of a court of appeals ruling that holds a petition to be successive, thus requiring authorization. The government suggests that the language of §2244(b)(3)(E) is "broad enough" to include such appeals. (Govt.'s Br. p. 24). However, Castro urges this Court not to attempt to "broaden" the plain language of the statute on an issue as important as whether or not he will be allowed to have his statutory right to a ruling on his habeas petition.

II. THE "LAW OF THE CASE" DOCTRINE IS NOT A LEGAL BASIS FOR DISMISSING PETITIONER'S FIRST TITLED § 2255 PETITION.

The government, for the first time in briefing this Court, raises the defense of "law of the case" to argue that Castro's § 2255 petition was properly dismissed by the

district court and subsequently by the court of appeals. (Govt.'s Br. p. 26). The government did not raise this issue in its Brief in Opposition to Petitioner's Writ of Certiorari. Furthermore, neither the district court, nor the court of appeals ever considered "law of the case" doctrine when deciding to dismiss Castro's petition as successive. For these reasons, and for the reasons that follow, "law of the case" is not sufficient grounds for dismissing Castro's petition.

A. The Government did not raise "law of the case" issue in its Brief in Opposition to Castro's Petition for Writ of Certiorari and is precluded from doing so now.

Supreme Court Rule 15.2, states in part, "any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the court's attention in the brief in opposition." In its Brief in Opposition to Petitioner's Writ of Certiorari,[1] the government argued two points. First, the government argued that there is "no need for this court to resolve the differences in approach among the court of appeals," as according to the government, the " . . . Eleventh Circuit thus effectively adopted, on a prospective basis, the approach mandated by other circuits, the question on which the courts of appeals have disagreed is unlikely to arise in future cases." Secondly, the government alleged "further

[1] Of note is the fact that in its brief in opposition to Castro's Petition for Writ of Certiorari, the government also stipulated that this Court has jurisdiction to hear this appeal under 28 U.S.C. § 1254(1).

review is also unwarranted in this case because petitioner cannot prevail on his motion under § 2255 in any event." (Govt.'s Br. in Opposition to Cert Petition pp. 9 & 10).

However, the government neither mentioned "law of the case" nor made such an argument to this Court prior to filing its brief on the merits. Therefore, pursuant to Supreme Court Rule 15.2, the government's argument that the "law of the case" doctrine precludes Castro's appeal should not be considered.

B. Castro had little if any incentive to challenge the district court's re-characterization of his Rule 33 Motion for New Trial on appeal.

In its brief, the government argues that Castro should be precluded under the "law of the case" doctrine from "relitigating" the district court and court of appeals "decisions" in which Castro's Rule 33 Motion for New Trial was also labeled as a § 2255 petition. (Govt.'s Br. p. 26). However, a closer look at how the initial appeal transpired shows that the issue of "re-characterization" was never really paramount and was never actually "ruled upon" in the strictest sense of the word.

Castro's initial 1994 post-conviction motion was titled only as a Rule 33 Motion for New Trial. (J.A. p. 7). In response, the government asserted that it had no objection to the court treating the Rule 33 motion also as a § 2255 petition. (J.A. p. 110). Castro filed a reply and argued that his Rule 33 motion was appropriately titled as a Rule 33 Motion for New Trial. (J.A. p. 116). In its lengthy Order of October 28, 1994, the district court did state "in the government's response, the government asserts that it has

no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255. Accordingly, the court will consider defendant's motion as requesting both kinds of relief." (J.A. p. 139 & 140). However, in deciding the issue, the district court used Rule 33 analysis. (J.A. p. 140). Furthermore, the initial paragraph of the Order states "currently before the court is defendant Castro's motion for new trial pursuant to Federal Rule of Criminal Procedure 33 filed July 11, 1994. The government's response was filed August 22, 1994, the defendant's reply was filed September 12, 1994. For the reasons set forth below, defendant's motion for new trial is DENIED." (J.A. p. 137). The court of appeals simply affirmed. (J.A. p. 147).

A closer look at the facts shows that Castro had no incentive to make issue of the court's "re-characterization" at the time which in hindsight proved detrimental to his § 2255 petition. The re-characterization of the Rule 33 motion as one under Rule 33 and § 2255 had no preclusive effect because it was not essential to the rulings of the district court and the court of appeals denying the motion and affirming the denial, respectively. Nothing turned on that "re-characterization." It did not affect the standard applied in determining whether relief was warranted. The "law of the case" doctrine is not so strictly construed as to require an appeal of every seemingly minor point raised in a previous court opinion. The government's application of the "law of the case" doctrine to Castro's appeal is inappropriate because the doctrine is not as broad and final as the government argues.

"Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona*, at 618.

"What identifies this as true law of the case preclusion is that the first appeals court has affirmatively decided the issue, be it explicitly or by necessary implication." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 738 (D.C. Cir. 1995). Arguably, the district court and court of appeals in Castro's case never "affirmatively decided" the issue as to what label to place on his Rule 33 motion. Simply determining to add another title to a motion in what seemingly was an attempt to *assist* Castro is not the type of affirmative decision, which if not appealed, becomes the "law of the case" for all time.

Another reason Castro had little if any reason to appeal the "re-characterization" of his Rule 33 motion is because the motion was filed prior to the enactment of AEDPA. AEDPA's gatekeeping requirements make it nearly impossible for a petitioner to file a § 2255 petition. Contrary to the government's assertions, pre-AEDPA law was not nearly as strict on successive petitions. It certainly did not provide for the practical absolute bar to second petitions as AEDPA does. As Justice Thomas stated in his dissenting opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 648 (1998), " . . . before enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1218, a federal court could grant relief on a claim in a second or successive application so long as the ground for relief had not already been 'presented *and determined*,' 28 U.S.C. § 2244(a) (emphasis added), or 'adjudicated,' § 2244(b), in a previous application." The

ground for relief which Castro presented in his first titled 1997 § 2255 petition and which he presented at the evidentiary hearing had never been presented by Castro or determined by any court. Therefore, prior to AEDPA being enacted, there was no reason for Castro to appeal a seemingly insignificant "re-characterization" or "additional labeling" of his Rule 33 motion. Certainly, Castro did not have the requisite incentive to appeal this issue so that the "law of the case" doctrine now precludes such an appeal.

C. "Law of the case" does not apply where such application would work a "manifest injustice."

Finally, assuming that "law of the case" does apply to Castro's appeal to this Court, "under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. at 619. "Similarly, an appellate court may deviate from the law of the case if the previous decision was 'clearly erroneous and would work a manifest injustice,' which would not justify overturning a final judgment." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d at 740, citing *Arizona v. California*, 460 U.S. at 618.

Castro's entire brief on the merits addresses why re-characterization of his Rule 33 motion was "manifestly unjust". Castro's Rule 33 motion was properly pled and should not have been re-characterized. The consequences in doing so have resulted in preventing Castro from ever filing a first habeas petition, which he has a statutory right to file. The government does not dispute in its brief

on the merits that the re-characterization of Castro's Rule 33 motion was clearly erroneous. No law precludes the filing of a Rule 33 motion and a § 2255 by the same petitioner. Furthermore, presumably, the purpose for the district court's re-characterizing Castro's pre-AEDPA Rule 33 motion at the insistence of the government was to *assist* Castro. As this Court has recognized, "this accommodation is the result of the time honored practice of liberally construing pleadings of pro-se plaintiffs." *Haynes v. Kerner*, 404 U.S. 519, 520 (1972). If the purpose of re-characterizing Castro's pro-se Rule 33 motion was not to assist him, but an effort by the government to take advantage of a pro-se inmate's ignorance with regard to "abuse of the writ" principles, then this practice is "manifestly unjust" for obvious reasons. Either way, to prevent Castro from filing a habeas petition due to the argument that his previously filed post-conviction motion was re-labeled at the urging of the government is unjust and therefore "law of the case" should not prevent this appeal.

CONCLUSION

The clear wording of the statute allows this Court jurisdiction to hear Castro's argument that the district court and court of appeals erred in ruling that his 1997 habeas petition is successive. Furthermore, the government's assertion that "law of the case" doctrine precludes this appeal is incorrect for the reasons stated herein. The government apparently concedes that Castro's Rule 33 Motion for New Trial was improperly re-characterized. Therefore, Castro requests that this Honorable Court

grant him the opportunity to have his § 2255 petition ruled upon.

Respectfully submitted,

This 16th day of July, 2003

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Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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QUESTIONS PRESENTED

1. If a prisoner's motion under 28 U.S.C. § 2255 is dismissed as successive, and the prisoner – rather than applying to the court of appeals for authorization to file a successive motion – appeals the dismissal on the ground that his motion is not successive, and the court of appeals then affirms the dismissal, is a petition for certiorari barred by 28 U.S.C. § 2244(b)(3)(E), which provides that a denial of authorization to file a successive application shall not be the subject of a petition for certiorari?

2. When a federal prisoner requests relief for the first time under 28 U.S.C. § 2255, is his motion subject to dismissal as a second or successive motion under § 2255 because the court, over the prisoner's objection and without notice, previously treated a *pro se* motion properly brought by the prisoner under another rule or statute as also requesting relief under § 2255?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper and fair administration of justice, and the continued recognition of and adherence to the Bill of Rights in order to sustain the quality of the American system of justice.

STATUTORY PROVISIONS AND RULE INVOLVED

When petitioner moved in 1994 for a new trial based on newly discovered evidence, Federal Rule of Criminal Procedure 33 provided in pertinent part:

[1] This *amicus curiae* brief is submitted in support of petitioner Hernan O'Ryan Castro. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief. No party other than counsel authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief.

> A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

Title 28, section 2255 of the United States Code provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> . . . .
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 28, section 2244 of the United States Code provides in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> . . . .
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not

be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT

Petitioner Hernan O'Ryan Castro was tried and found guilty on a two-count indictment in April 1992. J.A. 137. On July 14, 1992, a judgment of conviction was entered, and a twenty-year prison sentence was imposed. J.A. 3-5. The Court of Appeals issued an opinion affirming Castro's conviction on March 24, 1994 and denied rehearing en banc on June 15, 1994. J.A. 137-38; 26 F.3d 1123 (table). This Court denied certiorari on October 17, 1994. 513 U.S. 950.

A. Proceedings on the Motion Brought by Petitioner Under Rule 33.

On July 5, 1994, less than one month into the two-year period that Fed. R. Crim. P. 33 then provided for such motions, petitioner filed a motion under Rule 33 for a new trial on the ground of newly discovered evidence. J.A. 7. Petitioner filed the motion *pro se*. *Id.* The principal grounds for petitioner's motion were the government's failure to disclose that it had entered into a letter agreement granting testimonial immunity to an important government witness, and its failure to correct false testimony. J.A. 9-35. Petitioner sought relief under *Brady v. Maryland*, 373

U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). J.A. 9.

In opposing petitioner's motion, the government contended that "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255 . . . ." J.A. 110. The government cited no authority in support of its contention. Although petitioner had not sought relief under § 2255, the government announced it had "no objection" to his motion "being considered as demanding relief under Rule 33 and 28 U.S.C. § 2255." J.A. 110.

In his reply, petitioner disputed the government's contention that his *Brady/Giglio* claim was "more properly cognizable" under § 2255. Petitioner insisted he had "filed the proper motion." J.A. 116.

The District Court denied petitioner's motion on October 28, 1994. J.A. 137. After noting that the government had said it "has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33 and 28 U.S.C. § 2255," the court said it would "consider defendant's motion as requesting both kinds of relief." J.A. 140. The court did not address whether the government was correct in asserting that the *Brady/Giglio* claim was "more properly cognizable" under § 2255. On the merits, the court noted the government's concession that three of the four requirements for relief under *Brady* were satisfied, but it ruled that petitioner had not satisfied the fourth, which requires a reasonable probability that the suppression affected the outcome. J.A. 140-41.

Petitioner appealed from the denial of his motion. As in the District Court, he sought no relief under § 2255. In a one-paragraph opinion issued on March 19, 1996, the

Court of Appeals affirmed for the reasons set forth by the District Court. J.A. 147.

B. Proceedings on the Motion Brought by Petitioner Under § 2255.

On April 22, 1997, petitioner, still proceeding *pro se*, filed a timely motion under § 2255 to vacate his sentence. J.A. 148-61. Petitioner advanced several claims of denial of effective assistance of counsel. J.A. 154-55. The District Court denied the motion on the merits on April 13, 1998 and denied a certificate of appealability. J.A. 162. In February 1999, however, the Court of Appeals granted petitioner's motion for issuance of such a certificate with respect to one of petitioner's ineffective-assistance claims. J.A. 165.

On June 13, 2000, the Court of Appeals ruled that the District Court had decided the ineffective-assistance issue under the wrong legal standard. J.A. 172. The Court of Appeals vacated the denial of petitioner's § 2255 motion and remanded with instructions to apply the correct standard, develop the facts more fully, and "examine the record to determine if this petition is successive." J.A. 172.

On remand, counsel was appointed to represent petitioner. But shortly before the start of an evidentiary hearing on the ineffective-assistance claim, the government moved to dismiss petitioner's § 2255 motion as successive, relying upon the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1217. Petitioner opposed the motion, disputing that his motion is successive. The magistrate judge held a one-day evidentiary hearing and received post-hearing briefs but later recommended that petitioner's motion be

dismissed as successive. J.A. 175-81. He reasoned that in 1994 petitioner had "asserted his right to a new trial based on alleged constitutional violations .... Specifically, petitioner alleged that the Government violated the rules enunciated in *Brady* and *Giglio* when it failed to disclose exculpatory evidence and used perjured testimony." J.A. 180. In the judge's view, because "petitioner's claims were based on his constitutional rights to due process," they "were more properly raised in a 28 U.S.C. § 2255 motion." J.A. 180. No case law or other authority was cited in support of that determination.

The District Court adopted the magistrate judge's report and recommendation, added a few comments of its own, and dismissed petitioner's motion as successive. J.A. 182-85. According to the court, petitioner had been "put on notice by the Government's response to his motion for a new trial, filed under Federal Rule of Criminal Procedure 33, that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion." J.A. 183. No precedent for so construing the motion was cited. Although in 1994 petitioner had begun his argument in reply by referencing the government's contention about § 2255 and then insisting he had "filed the proper motion," J.A. 116, the District Court faulted petitioner for "never object[ing] to the characterization of his motion as one under § 2255." J.A. 183.

The District Court granted a certificate of appealability on one issue: whether Castro's 1997 motion is a successive motion. J.A. 186. Petitioner did not apply for authorization to file a successive motion but instead through his appeal challenged the District Court's ruling

that his motion was successive. *See* Brief of Appellant Hernan O'Ryan Castro, No. 01-12181 (June 8, 2001).

On January 2, 2002, the Court of Appeals issued an opinion that, had it not been withdrawn, would have vacated the District Court's dismissal. J.A. 188-97. "O'Ryan Castro's Rule 33 motion for new trial asserted a cognizable ground for relief," the court noted. J.A. 196. "The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion." J.A. 196. Moreover, in his *pro se* reply in support of his 1994 motion, petitioner had "made the effort to reply in a manner that reaffirmed his intent to move for a new trial under [Rule 33] rather than seek habeas relief." J.A. 196. The court held that petitioner's 1997 motion was not a successive § 2255 motion because "a district court's re-characterization of a petitioner's initial postconviction motion will not be considered a 'first' habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization." J.A. 197.

The government did not request rehearing or rehearing en banc. Nevertheless, the Court of Appeals withheld issuance of its mandate. Eventually, on May 7, 2002, a divided panel vacated the prior opinion *sua sponte* and substituted an opinion affirming the dismissal of petitioner's motion as successive. J.A. 198-208.

This time, the panel majority emphasized that "when [petitioner] filed his motion for new trial pursuant to Rule 33 based upon newly discovered evidence, the District Court recharacterized his Rule 33 motion as both a motion for a new trial and a § 2255 motion." J.A. 200-01. According to the new opinion, "O'Ryan Castro's claims were based upon his constitutional right to due process and

were more properly raised in a § 2255 petition." J.A. 201. The opinion cited no authority supporting that conclusion. But declaring that "[d]istrict courts have always had the power to recharacterize pro se petitioners' motions," *id.*, the panel majority deemed petitioner's 1997 motion under § 2255 a successive motion. J.A. 202-04. Judge Roney dissented. J.A. 207-08.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction to review the decision of the Court of Appeals. Petitioner does not seek review of the denial of authorization to file a successive motion; he seeks review of the ruling that his motion was successive. Title 28, section 2244(b)(3)(E) of the United States Code provides only that the grant or denial of authorization to file a successive application shall not be the subject of a petition for certiorari.

II. The Eleventh Circuit was demonstrably wrong in ruling that petitioner's 1997 motion was an impermissible second or successive motion under § 2255. Section 2255 by its terms restricts only the filing of "[a] second or successive *motion* . . . ." (Emphasis added). The restriction plainly applies only to a second or successive motion under § 2255. For three reasons, petitioner's 1994 motion was not a motion under § 2255, and therefore his 1997 motion was his first motion under that statute.

First, petitioner filed his 1994 motion solely under Rule 33. When challenged by the government, he did not acquiesce in having his motion considered under § 2255 but rather insisted he had filed the proper motion. For the fundamental reason that petitioner requested no relief

under § 2255, he cannot be said to have made a "motion" under § 2255. The court may have imputed to him a request for relief under that statute, but he did not move for relief under it.

Second, it was entirely proper for petitioner to bring his 1994 motion solely under Rule 33. When *Brady* and *Giglio* claims are predicated on newly obtained proof as was the case here, they can be raised under Rule 33 in a motion for new trial based on newly discovered evidence. *See, e.g.*, *United States v. Runyan*, 290 F.3d 223, 246-47 (5th Cir. 2002); *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000); *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997); *United States v. Kelly*, 790 F.2d 130, 135 (D.C. Cir. 1986). Indeed, in *Giglio* itself, the defendant sought relief, and eventually obtained it in this Court, by filing exactly such a motion. 405 U.S. at 152. Whether or not courts have any latitude to recharacterize, as § 2255 motions; motions that are *improperly* brought under another rule or statute, there is no justification for recharacterizing, over the prisoner's objection, a motion *properly* brought under another rule or statute.

Third, the court never put petitioner on notice that, if he proceeded with his motion, he would be deemed to have moved for relief under § 2255. Even if petitioner's reliance on Rule 33 had been mistaken, under no reasonable interpretation of AEDPA's restrictions on second or successive motions can a prisoner's motion for relief under another rule or statute be deemed a motion under § 2255, in the absence of (1) notice of the court's intention to recharacterize his motion as one under § 2255, and (2) voluntary action by the prisoner in proceeding forward after having received such notice. *See Morales v. United States*, 304 F.3d 764, 767 (8th Cir. 2002); *United States v. Palmer*, 296 F.3d 1135, 1146 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002); *United States v. Emmanuel*, 288 F.3d 644, 649 (4th Cir. 2002); *Henderson v. United States*, 264 F.3d 709, 710 (7th Cir. 2001); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000); *United States v. Miller*, 197 F.3d 644, 650-52 (3d Cir. 1999); *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE ELEVENTH CIRCUIT'S RULING THAT PETITIONER'S 1997 MOTION IS A SUCCESSIVE MOTION UNDER § 2255.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Court of Appeals. That conclusion is dictated by the language of § 2244(b)(3)(E) and is supported as well by this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

By its terms, the provision in § 2244(b)(3)(E) that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a petition for rehearing or for a writ of certiorari" does not apply to the ruling of the Court of Appeals in this case. Whether or not that provision deprives this Court of jurisdiction to review, on a writ of

certiorari, a denial of authorization to file a successive motion under § 2255,[2] petitioner does not seek review of such a denial. Instead, petitioner seeks review of the ruling of the Court of Appeals that his motion is successive.

Whether petitioner's motion is successive was the sole issue before the Court of Appeals. Indeed, the sole issue on which petitioner was granted a certificate of appealability was whether his 1997 motion is successive. J.A. 186. Petitioner has consistently contended that his motion is not successive, and therefore he has never applied for authorization to file a successive motion. Nothing in the language of § 2244(b)(3)(E) suggests that it affects this Court's jurisdiction to review the Eleventh Circuit's ruling

[2] Section 2255 provides that "[a] second or successive motion must be certified as provided in section 2244 ...." It is thus clear that a second or successive motion under § 2255 requires authorization of the appropriate court of appeals. It is not clear, however, that § 2244(b)(3)(E) applies to the grant or denial of authorization for a federal prisoner to file a successive motion under § 2255, as opposed to the grant or denial of authorization for a state prisoner to file a successive application under 28 U.S.C. § 2254. Section 2244(b) does not itself refer to § 2255 but only refers to applications under § 2254. *See* 28 U.S.C. § 2244(b)(1) & (2); *see also Felker v. Turpin*, 518 U.S. 651, 658-59 (1996) ("Section 2244(b)(3) prevents this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or writ of certiorari."). Moreover, although the last paragraph of § 2255 provides that second or successive motions under § 2255 must be certified as provided in § 2244 to contain one of the matters described in the last paragraph of § 2255, Congress did not specify that grant or denial of such certification shall not be the subject of a petition for certiorari. And review on writ of certiorari of a denial of certification to file a second or successive § 2255 motion does not implicate the federalism or comity concerns implicated when federal habeas corpus review of a state court judgment is prolonged.

that petitioner's 1997 motion is successive. That provision eliminates certiorari jurisdiction with respect to "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application ... ," not with respect to a ruling that an application is or is not a second or successive application.

In *Martinez-Villareal*, this Court considered whether § 2244(b)(3)(E) deprived it of jurisdiction to review the Ninth Circuit's holding that the § 2244(b) restrictions on successive petitions did not apply to a habeas corpus petition that challenged only the petitioner's competency to be executed. The Court held that its jurisdiction was not affected by § 2244(b)(3)(E):

> If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider the petitioners' petition and would have to dismiss the writ. This is not, however, what the Court of Appeals did. The Court of Appeals held that the § 2244(b) restrictions simply do not apply to respondent's *Ford* [*v. Wainwright*, 477 U.S. 399 (1986),] claim, and that there was accordingly no need for him to apply for authorization to file a second or successive petition. We conclude today that the Court of Appeals reached the correct result in this case, and that we therefore have jurisdiction to consider petitioners' petition.

523 U.S. at 641-42.

In this case, as in *Martinez-Villareal*, the issue decided by the Court of Appeals was whether the § 2244(b) restrictions apply, not whether to authorize a successive application. "If the Court of Appeals in this case had

[denied petitioner] leave to file a second or successive application, then [this Court] would be without jurisdiction to consider the [Castro's] petition and would have to dismiss the writ." 523 U.S. at 641. But as in *Martinez-Villareal*, "[t]his is not . . . what the Court of Appeals did." *Id.* Petitioner never requested leave to file a second or successive application but instead pressed his contention that his motion was not a second or successive motion. The Court of Appeals held that it was a second or successive motion, but that holding was error. *See* Part II, *infra*. An erroneous invocation of the § 2255 restrictions on second or successive motions cannot shut the door to a petition for certiorari, for § 2244(b)(3)(E) only precludes review on writ of certiorari of "[t]he grant or denial of an authorization by a court of appeals to file *a second or successive application* . . . ." (Emphasis added). Petitioner's 1997 motion was not "a second or successive application," and petitioner neither sought nor was required to seek authorization to file such an application. Section 2244(b)(3)(E) therefore does not apply.

II. THE RECHARACTERIZATION OF PETITIONER'S RULE 33 MOTION AS A § 2255 MOTION DOES NOT JUSTIFY DISMISSAL OF HIS FIRST REQUEST FOR RELIEF UNDER § 2255 AS SUCCESSIVE.

The Court of Appeals erred in ruling that, when petitioner in 1997 requested for the first time that he be granted relief under § 2255, his motion was nevertheless a successive motion under the statute.

A. In 1994, Petitioner Requested No Relief Under § 2255.

Analysis should begin with the language of the statute. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001). Section 2255 restricts only the filing of "[a] second or successive *motion* . . . ." (Emphasis added). Congress could have imposed restrictions on a second or successive consideration by a federal district court of a prisoner's entitlement to relief under § 2255. But that is not what Congress did. It chose only to limit the filing of multiple motions under the statute.

Under the ordinary definition of a "motion," petitioner's 1994 filing was not a motion under § 2255. BLACK'S LAW DICTIONARY (7th ed. 1999) defines a motion as "[a] written or oral application requesting a court to make a specified ruling or order." *Id.* at 1031; *see also* BLACK'S LAW DICTIONARY 1013 (6th ed. 1990) (defining "motion" as "[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant"). In 1994 petitioner did not request any relief under § 2255, insisted upon proceeding under Rule 33, and thus did not make a motion under § 2255, as the term "motion" is ordinarily understood.[3]

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[3] *See, e.g.*, *Raineri*, 233 F.3d at 100 ("The petitioner's original motion was not premised upon section 2255 at all, but, rather upon Rules 33 and 35. Having dictated the terms of engagement, the petitioner was entitled to have his motion decided as he had framed it."); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994) ("[W]e decline to construe Defendant's Rule 32 motion as a § 2255 motion because it is apparent . . . that Defendant did not intend the motion to be so construed.").

B. It Was Completely Proper for Petitioner To Bring His 1994 Motion Solely Under Rule 33.

One may assume for the sake of argument that in some circumstances, even though a prisoner had never before requested any relief under § 2255, a court nonetheless might be permitted to treat his first request for relief under that statute as "[a] second or successive motion . . . ," on the ground that the rule or statute invoked by the prisoner in a prior motion was not applicable and therefore the motion could only have been brought under § 2255. In this case, however, that assumption takes the government nowhere, for *petitioner's 1994 motion was properly brought under Rule 33.*

A motion under § 2255 to vacate a sentence or conviction and a motion under Rule 33 for a new trial based on newly discovered evidence are "separate and distinct means of attacking a judgment." *United States v. Shaffer*, 789 F.2d 682, 687 n.5 (9th Cir. 1986); *accord United States v. Ostrer*, 422 F. Supp. 93, 95 (S.D.N.Y. 1976); *cf. Heflin v. United States*, 358 U.S. 415 (1959) (granting relief under Fed. R. Crim. P. 35 though relief was not available under § 2255). Sometimes only § 2255 is available.[4] On other occasions, a citizen may find that her only vehicle for obtaining relief is Rule 33.[5] In still other instances, both Rule 33 and § 2255 may be available.

[4] For example, Rule 33 by its terms only authorizes a motion for a new trial and thus is not available to challenge a conviction pursuant to a guilty plea. *See, e.g., Raineri,* 233 F.3d at 100 n.4.

[5] For example, § 2255 authorizes a motion only by a person "in custody." Similarly, courts will not entertain a § 2255 motion while an

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In this case, it was entirely proper for petitioner to raise his *Brady/Giglio* claim under Rule 33. In *Giglio* itself, this Court held that a defendant was entitled to a new trial based on new evidence that, contrary to a key government witness's testimony on cross-examination, a prosecutor had promised the witness he would not be prosecuted if he testified. The defendant had presented the new evidence in a Rule 33 motion for a new trial based on newly discovered evidence. *See Giglio v. United States*, 405 U.S. 150, 152 (1972). Similarly, in *United States v. Agurs*, 427 U.S. 97 (1976), the Court decided on the merits the defendant's claim that he was entitled to a new trial under *Brady* because of new evidence that the prosecution had failed to disclose impeachment material. *Id.* at 113-14. Once again, the evidence had been presented in a Rule 33 motion for a new trial based on newly discovered evidence. *See id.* at 100. The courts of appeals likewise have recognized that a claim of prosecutorial suppression of exculpatory or impeachment material, if based on newly obtained evidence that the defendant could not have obtained earlier through due diligence, is properly raised under Rule 33 in a motion for new trial based on newly discovered evidence. *See, e.g., United States v. Runyan*, 290 F.3d 223, 246-47 (5th Cir. 2002); *United States v. Josleyn*, 206 F.3d 144, 151-52 (1st Cir. 2000); *United States v. Frost*, 125

appeal is pending. *See* CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 597, at 483 & n.10 (2d ed. 1982), and cases cited therein. In contrast, when a Rule 33 motion is filed while an appeal is pending, the district court has "jurisdiction to entertain the motion and either deny the motion on the merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case." *United States v. Cronic*, 446 U.S. 648, 667 n.42 (1984).

F.3d 346, 382 (6th Cir. 1997); *United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990); *United States v. Douglas*, 874 F.2d 1145, 1161, 1163 (7th Cir. 1989); *United States v. Kelly*, 790 F.2d 130, 135 (D.C. Cir. 1986) (Wald, J., joined by Scalia & Starr, JJ.).[6]

[6] Federal courts also have entertained a wide variety of other constitutional claims presented in motions under Rule 33 for a new trial based on newly discovered evidence, including claims of improper influence upon the jury, *see United States v. Endicott*, 869 F.2d 452, 457 (9th Cir. 1989); *Government of V.I. v. Joseph*, 685 F.2d 857, 863 n.3 (3d Cir. 1982); *United States v. Jones*, 597 F.2d 485, 488 (5th Cir. 1979); *Richardson v. United States*, 360 F.2d 366, 368 (5th Cir. 1966); *Holmes v. United States*, 284 F.2d 716, 719-20 (4th Cir. 1960), intrusion into confidential communications protected by the Sixth Amendment right to counsel, *see Kelly*, 790 F.2d at 136-38; *United States v. Disston*, 582 F.2d 1108, 1112 (7th Cir. 1978); *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F.2d 749, 756-57 (D.C. Cir. 1951), violation of the Fourth Amendment, *see United States v. Bascaro*, 742 F.2d 1335, 1344 (11th Cir. 1984); *United States v. Williams*, 737 F.2d 594, 616-17 (7th Cir. 1984), and incompetence to stand trial, *see United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995). *See also Cronic*, 466 U.S. at 667 n.42; *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980); *United States v. Fuentes-Lozano*, 580 F.2d 724, 725-26 (5th Cir. 1978).

A recent Seventh Circuit decision, *United States v. Evans*, 224 F.3d 670 (7th Cir. 2000), treats a Rule 33 motion raising constitutional claims as a § 2255 motion, for purposes of the restrictions on second or successive motions, unless the motion is what the court calls "[a] *bona fide* motion for a new trial on the basis of newly discovered evidence motion." *Id.* at 673. Such a "*bona fide* motion," said the court, "does *not* contend that the conviction or sentence violates the Constitution or any statute." *Id.* at 673-74 (emphasis added). *Evans* is misguided and in any event does not assist the government here. First, Rule 33 refers generally to "newly discovered evidence," and nothing in its text remotely suggests that motions alleging constitutional violations are any less *bona fide* than motions not alleging such violations. Second, the opinion in *Evans* ignores decisions reaching back half a century that have entertained new-evidence motions alleging constitutional

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Neither the District Court nor the Court of Appeals conducted the kind of examination that should be required before any motion filed under another rule or statute can be treated as a motion under § 2255 for purposes of that statute's restrictions on multiple motions. In response to petitioner's initial post-conviction motion, the government asserted that "Castro's allegation of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. § 2255 . . . . " J.A. 110. But neither the District Court nor the Court of Appeals considered – in any of their rulings in this case – whether the government could back up that assertion with *any* authority.

In short, the courts below never asked a question that should be asked before any recharacterization of a post-conviction motion – whether brought by a *pro se* prisoner or not – is ever held to bar a later motion under § 2255: Was the first motion properly brought under the rule or statute relied upon by the movant? In this case, the answer to that question is "Yes." Because petitioner's 1994 motion was properly brought under Rule 33, under no circumstances should it have been treated as a § 2255 motion, for purposes of the restriction on successive motions, without petitioner's consent.

violations. Third, the prisoner before the court in *Evans* appeared *pro se*. *See id.* at 672. The Seventh Circuit did not appoint counsel and therefore did not have the benefit of adversary briefing by counsel. Finally, the Seventh Circuit itself subsequently held that a motion treated as a § 2255 motion only by virtue of *Evans*'s judge-made rule does not count as a § 2255 motion for purposes of the restrictions on second or successive motions, where, as here, the movant was afforded no notice. *See Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001).

The mere preference of the government or the court to decide the 1994 motion under § 2255 as well Rule 33 affords no justification for barring a later motion under the statute. The United States Code and the Federal Rules of Criminal Procedure authorizes certain motions that may be brought by citizens who believe they were wrongfully convicted of a federal crime.[7] If a citizen properly files one of those motions, the court should not be permitted to foreclose the citizen from thereafter timely filing another authorized motion, by the court's action in imputing to the citizen, over objection, a request for relief under a provision that the citizen did not invoke. Absent the movant's consent, the most basic precondition for ever treating a motion filed under another provision as a motion under § 2255, for purposes of that statute's restrictions on successive motions, should be careful consideration of whether the motion could *only* be brought under § 2255.

C. Petitioner Was Not Afforded Notice of the District Court's Proposed Recharacterization or an Opportunity To Withdraw His Motion.

Even if petitioner's 1994 motion had not been a proper Rule 33 motion, the court's recharacterization of the motion could not justify dismissal of his 1997 motion, absent notice in 1994 that petitioner's motion would be recharacterized and an opportunity to withdraw it.

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[7] *See United States v. Prescott*, 221 F.3d 686, 689 (4th Cir. 2000) ("A variety of post-trial motions are available to prisoners and were available before the enactment of the AEDPA.").

Prior to AEDPA, courts sometimes treated *pro se* motions filed under other provisions as § 2255 motions in order to reach the merits of the claims presented. *See Raineri v. United States*, 233 F.3d 96, 97 (1st Cir. 2000) ("[C]ourts frequently have recharacterized inartfully drawn pleadings to assist pro se prisoners who mistakenly relied on inappropriate rules or statutes."). Whether a motion filed under another provision would be deemed a § 2255 motion depended on the circumstances and the practice of the court in which the motion was filed. For example, in *United States v. Jordan*, 915 F.2d 622 (11th Cir. 1990), a defendant proceeding *pro se* mistakenly relied upon Fed. R. Crim. P. 35(a) in contending that his offense of conviction was not punishable by a term of supervised release. *Id.* at 624. The Eleventh Circuit held that the defendant's claim was properly decided under § 2255. *Id.* at 625. In contrast, in *United States v. Warner*, 23 F.3d 287 (10th Cir. 1994), the Tenth Circuit declined to treat a motion under Fed. R. Crim. P. 32 as a § 2255 motion, "because it is apparent . . . that Defendant did not intend the motion to be so construed." *Id.* at 291.

AEDPA has required courts to rethink the proper approach to recharacterization because the statute prohibits consideration of a second or successive § 2255 motion except in limited circumstances. Whereas before AEDPA some courts routinely recharacterized *pro se* motions filed under other provisions as § 2255 motions, *see Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998), nearly all the circuits have recognized that after AEDPA such an approach is not appropriate. Otherwise, "a conversion, initially justified because it harmlessly assisted the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity

to have a well-justified grievance adjudicated," *id.*, and prisoners "face losing potentially valid constitutional claims at the hands of judges who are applying a rule of liberal construction that was created to benefit pro se claimants." *United States v. Miller*, 197 F.3d 644, 649 (3d Cir. 1999).

Ten of the twelve circuits that hear criminal cases have concluded that AEDPA is not properly construed to permit dismissal of a § 2255 motion as second or successive, based on a prior recharacterization of a motion filed under another rule or statute, unless the movant (i) consented to the recharacterization or (ii) was given notice of the proposed recharacterization and an opportunity to withdraw the motion. *See Morales v. United States*, 304 F.3d 764, 767 (8th Cir. 2002); *United States v. Palmer*, 296 F.3d 1135, 1146 (D.C. Cir. 2002); *In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002); *United States v. Emmanuel*, 288 F.3d 644, 649 (4th Cir. 2002); *Henderson v. United States*, 264 F.3d 709, 710-11 (7th Cir. 2001); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *Raineri*, 233 F.3d at 100-101; *Miller*, 197 F.3d at 650-52; *Adams*, 155 F.3d at 584;[8] *see generally* Harvey Bartle, Comment, *One*

[8] Some of the cited decisions disagree on one issue not critical to the outcome here, i.e., whether courts should refrain from recharacterizing a post-conviction motion unless they follow procedures ensuring notice and an opportunity to withdraw, or may instead follow prior practices but simply not count, for purposes of the restrictions on second or successive motions, a motion recharacterized as a § 2255 motion without notice and an opportunity to withdraw. *Compare Ranieri*, 233 F.3d at 100 (declining to require district courts to use "a new protocol" in deciding initial post-conviction motions), *with, e.g., Miller*, 197 F.3d at 652 (specifying procedure for district courts to

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Bite at the Apple: The Effect of Recharacterization on Post-conviction Relief Under 28 U.S.C. § 2255, 75 TEMP. L. REV. 613 (2002). These decisions are sound, and the construction they adopt should be adopted by this Court as well.[9]

Once it is accepted that a motion should not be recharacterized without notice and an opportunity to withdraw the motion, a third basis for reversal of the Eleventh Circuit's decision becomes clear. At no time before the District Court decided petitioner's 1994 motion did the court notify petitioner of its intention to recharacterize his motion or give him an opportunity to withdraw the motion. Moreover, far from acquiescing in the government's request that his motion be recharacterized, petitioner unequivocally insisted he had properly filed the motion under Rule 33. Under these circumstances, petitioner's 1994 motion could not justifiably be counted as a motion

follow). Notwithstanding this one area of disagreement, these ten circuits concur that when a motion has been recharacterized as a § 2255 motion without notice to the prisoner, a later § 2255 motion is not a second or successive motion under the statute.

[9] Apart from the Eleventh Circuit's decision here, the only contrary decision is *In re Tolliver*, 97 F.3d 89 (5th Cir. 1996). In a one-page opinion issued less than six months after AEDPA was signed into law, the Fifth Circuit held that a prisoner's § 2255 motion was successive because the district court had construed his prior post-conviction motion "as a § 2255 motion, and granted the motion and ordered the relief sought," and "there is nothing else [the prior motion] could be" but a § 2255 motion. 97 F.3d at 90. The present case is distinguishable on both points. Petitioner was denied relief in 1994, and his motion was proper under Rule 33. Moreover, the opinion in *Tolliver* did not discuss the issue of notice and provided no reasoning that would support a general practice of counting a motion recharacterized as a § 2255 motion as a first § 2255 motion for purposes of the restrictions on second or successive motions.

under § 2255, even if petitioner's reliance on Rule 33 had been in error (which it was not).

In dismissing petitioner's 1997 motion as successive, the District Court reasoned that in 1994 petitioner had been "put on notice by the Government's response to his motion for a new trial . . . that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion." J.A. 183. But in reality petitioner had only been put on notice that *the government believed* petitioner's motion was "more properly cognizable" under § 2255. He was not put on notice that the motion *should be* construed as a motion under § 2255. For the government never came forward with any support for its contention. And although it would not have been sufficient in any event (given that petitioner was fully within his rights in electing to proceed solely under Rule 33), the District Court did not afford petitioner notice, before ruling on his motion, of its intention to recharacterize the motion as one under Rule 33 and § 2255, and give him an opportunity to withdraw the motion.

In interpreting the § 2244(b) restriction on second or successive habeas corpus applications, this Court has rejected proposed literal constructions that would have denied state prisoners the opportunity to have at least a single determination of their constitutional claims by a federal court. *See Slack v. McDaniel*, 529 U.S. 473, 485-90 (2000) (holding that a habeas petition filed after an initial petition was dismissed for failure to exhaust state remedies is not a second or successive petition); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-46 (1998) (holding that the restriction on second or successive habeas petitions did not apply to a habeas petition presenting a

constitutional claim that the petitioner had raised in a prior habeas petition, where the claim in the prior petition had been dismissed as premature). In both *Slack* and *Martinez-Villareal*, the Court emphasized that the rejected constructions would have barred any federal habeas review of the prisoner's claims. *See Slack*, 529 U.S. at 487 ("The proposed rule would bar the prisoner from raising nonfrivolous claims . . . , even though a federal court has yet to review a single constitutional claim."); *Martinez-Villareal*, 523 U.S. at 645 ("To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.").

This case is easier than *Slack* and *Martinez-Villareal*. Whereas in those cases the rejected interpretations at least could be said to be consistent with the statutory text, here the statutory interpretation implicit in the Eleventh Circuit's decision finds no support in the language of § 2255. *See* Part II.A, *supra*. Yet that interpretation, like the ones rejected in *Slack* and *Martinez-Villareal*, would bar petitioner from ever obtaining review under § 2255 of a potentially meritorious constitutional claim, one of sufficient substance to convince the Court of Appeals to issue a certificate of appealability when petitioner sought to appeal from the initial denial of his 1997 motion. J.A. 165.[10]

[10] This case does not present the situation where a defendant unsuccessfully litigates an issue under Rule 33 and then attempts to relitigate that same issue under § 2255. Petitioner's ineffective-assistance claim has never been fully adjudicated; it was initially

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The Court's statement in *Slack* that "the phrase 'second or successive petition' [in § 2244(b)] is a term of art given substance in our prior habeas corpus cases," 529 U.S. at 486, is also significant. The phrase "second or successive motion" in § 2255 presumably is likewise to be viewed as a term of art given substance by prior case law. None of this Court's pre-AEDPA § 2255 cases support dismissal of a § 2255 motion, on the basis of a prior motion brought under a different rule or statute and recharacterized over objection and without notice.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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decided by the District Court in 1998, but that decision was vacated by the Court of Appeals because the wrong legal standard was used.